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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 35

GUSTAV H. KANN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 4, 1945.

CERTIORARI GRANTED APRIL 10, 1945.

SUPREME COURT OF THE UNITED STATES

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**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND, DECEMBER
TERM, 1942, HELD AT BALTIMORE**

December Term 1942 Held at Baltimore

Criminal No. 19993

UNITED STATES OF AMERICA

vs.

GUSTAV H. KANN, also known as G. H. KANN, JOSEPH BEN DECKER, SIDNEY M. FELDMAN, WILLIAM L. KANN, JR., JOHN J. PRIAL, VICTOR G. WILLIS, JR., and ARTHUR DEIBERT, Defendants

INDICTMENT—Filed February 16, 1943

First Count

The Grand Jurors of the United States, duly empaneled, sworn and charged to inquire in and for the District of Maryland, upon their oaths, present:

1. That at all times hereinafter mentioned Triumph Explosives, Inc., (hereinafter referred to as "Triumph") was a corporation organized under and pursuant to the laws of the State of Maryland, with its principal office and place of business at Elkton, Cecil County, Maryland; that said corporation was engaged in the manufacture and assembly of incendiary bombs, ammunition and other explosive materials and munitions of war (hereinafter referred to as "ordnance material") under contracts with the War Department of the United States of America and with the Navy Department of the United States of America.

[fol. 6] 2. That at all times hereinafter mentioned the approximately 400,000 shares of the common stock of Triumph, the exact amount being unknown to the Grand Jury, was distributed among, sold to, and held by the general public.

3. That at all times hereinafter mentioned Gustav H. Kann, also known as G. H. Kann, was President and a director of Triumph.

4. That at all times hereinafter mentioned Joseph Ben Decker was Executive Vice-President, General Manager and a director of Triumph.

5. That at all times hereinafter mentioned Sidney M. Feldman, William L. Kann, Jr., John J. Prial, Victor G. Willis, Jr., and Arthur Deibert were executive, administrative employees of Triumph and received salaries and compensation from Triumph.

6. That at all times hereinafter mentioned Elk Mills Loading Corporation was a corporation organized under and pursuant to the laws of the State of Maryland, with its principal place of business at Elkton, Maryland, said corporation being hereinafter referred to as "Elk Mills".

7. That heretofore, to-wit, from on or about December 2, 1941, and continuing thereafter up to and including the date of the return of this indictment at Elkton, Maryland, within the jurisdiction of this Court, Gustav H. Kann, Josef Ben Decker, Sidney M. Feldman, William L. Kann, Jr., John J. Prial, Victor G. Willis, Jr., and Arthur Deibert, hereinafter referred to as "defendants" unlawfully, willfully, knowingly, and feloniously devised and intended to devise a scheme and artifice to defraud Triumph and its stockholders and to obtain money and property by means of fraudulent representations, pretenses, and statements, [fol. 7] which said scheme and artifice is more particularly hereinafter described.

8. It was a part of said scheme and artifice to defraud that a large part of the profits earned and to be earned by Triumph on contracts which it held with the Government should be diverted from Triumph to said Elk Mills and its stockholders, and that said profits should be distributed through salaries, dividends, bonuses, and otherwise to the defendants by Elk Mills and that the stockholders of Triumph should be deprived of said profits earned and to be earned on said contracts with the Government, in the manner and by the means more particularly described hereafter.

9. It was a further part of said scheme and artifice that the defendant, in breach of their trust and in violation and betrayal of their fiduciary duties as officers and employees of Triumph (a) would and did cause Elk Mills to be organized and 49 per cent of the common stock of said Elk Mills

to be given to and distributed among Sidney M. Feldman, William L. Kann, Jr., John J. Prial, Victor G. Willis, Jr., and Arthur Deibert without payment of a valuable consideration therefor by either of the aforementioned persons; (b) would and did cause Triumph to subcontract to Elk Mills contracts which Triumph had secured from the War Department of the United States of America at prices which would and did result in huge and excessive profits to Elk Mills; (c) would and did cause the employees and certain services of Triumph to be utilized in the performance of the subcontract; (d) would and did receive from Elk Mills as salaries and bonuses, for which no real and substantial services were rendered, large sums of money; and (e) would receive from Elk Mills, as dividends, [fol. 8] large sums of money of which Triumph would be deprived by the said scheme and artifice.

10. It was a part of said scheme and artifice that on or about December 2, 1941, Sidney M. Feldman, John J. Prial, and Victor G. Willis, Jr., organized and did cause to be organized under and pursuant to the laws of the State of Maryland, a corporation known as Elk Mills Loading Corporation (hereinafter referred to as Elk Mills).

11. It was a further part of said scheme and artifice that the defendants would and did on January 2, 1942, cause Josef Ben Decker to be elected as President of Elk Mills, Gustav H. Kann to be elected as Vice-President of Elk Mills, Sidney M. Feldman to be elected as Secretary of Elk Mills, and John J. Prial, Victor G. Willis, Jr., and Arthur Deibert to be elected as consultants, and each to receive as salary the sum of \$5,200 per annum.

12. It was a further part of said scheme and artifice that the defendants, G. H. Kann, Josef Ben Decker, William L. Kann, Jr., Sidney M. Feldman, and John J. Prial, would be elected as directors of Elk Mills.

13. It was a further part of said scheme and artifice to defraud that the defendants, Josef Ben Decker and Gustav H. Kahn would make and cause to be made false and fraudulent representations and statements to the stockholders of Triumph on the minute book of said Triumph.

(a) That Elk Mills had been organized by Sidney M. Feldman, William L. Kann, Jr., John J. Prial, Victor

4
G. Willis, Jr., and Arthur Deibert, whereas in truth and fact, as the defendants then and there well knew, said representations and statements were false and fraudulent in that Elk Mills was not organized by all of the aforementioned persons but only by Sidney M. Feldman, John J. Prial, and Victor G. Willis, Jr.

[fol. 9] (b) That the Peoples-Pittsburgh Trust Company, to whom Triumph was indebted for various advances of money, had refused permission and consent to grant increases to Sidney M. Feldman, John J. Prial, Arthur Deibert, William L. Kann, Jr., and Victor G. Willis, whereas in truth and in fact, as the defendants then and there well knew, said representations and statements were false and fraudulent in that the Peoples-Pittsburgh Trust Company had not been requested to approve increases for the said Sidney M. Feldman, John J. Prial, Arthur Deibert, William L. Kann, Jr., and Victor G. Willis, Jr., at the time of the organization of Elk Mills, but had been requested to approve the organization, formation and granting of sub-contracts to Elk Mills Loading Corporation.

(c) That said Sidney M. Feldman, William L. Kann, Jr., John J. Prial, Victor G. Willis, Jr., and Arthur Deibert intended to leave the employ of Triumph and to operate Elk Mills in competition with Triumph whereas in truth and in fact, as the defendants, Josef Ben Decker and Gustav H. Kann, then and there well knew, said representations and statements were false and fraudulent in that Sidney M. Feldman, William L. Kann, Jr., John J. Prial, Victor G. Willis, Jr., and Arthur Deibert did not threaten and did not intend to leave the employ of Triumph Explosives, Inc., and did not intend to operate Elk Mills in competition with Triumph.

(d) That the defendants, Sidney M. Feldman, William L. Kann, Jr., John J. Prial, Victor G. Willis, Jr., and Arthur Deibert would purchase with their own funds and convey or cause to be conveyed to Elk Mills, free and clear of all liens and encumbrances, a tract of land in payment for the issue to them of 49 per cent [fol. 10] of Elk Mills stock, whereas in truth and fact, and as the defendants and each of them well said rep-

representations and statements were false and fraudulent in that it was not intended that Sidney M. Feldman, William L. Kann, Jr., John J. Prial, Victor G. Willis, Jr., and Arthur Deibert, or any of them, should use their own funds in purchasing land for Elk Mills and in payment for 49 per cent of the stock of Elk Mills to be issued to them.

14. It was a further part of said scheme and artifice that the defendants would and did cause 51 per cent of the stock of the Elk Mills to be issued to Triumph in consideration for the assigning, subletting and subcontracting by the said Triumph to Elk Mills of a contract or contracts which Triumph had received from the War Department of the United States of America and the remainder of the stock of Elk Mills, to-wit, 49 per cent to be issued to Sidney M. Feldman, William L. Kann, Jr., John J. Prial, Victor G. Willis, Jr., and Arthur Deibert and to be paid for from funds supplied directly or indirectly from the treasury of Triumph.

15. It was a further part of said scheme and artifice that the defendants would and did cause Triumph to enter into an agreement with Elk Mills whereby Elk Mills would manufacture, assemble and load ordnance material, which said ordnance material Triumph had theretofore contracted with the War Department of the United States of America to assemble, load and manufacture, and for which Elk Mills was to receive prices which were slightly less than the prices specified in the contract between Triumph and the said War Department, and the said Elk Mills would thereby derive large profits, which profits would inure to the benefit of the defendants through the medium of salaries, bonuses and dividends.

16. It was a further part of said scheme and artifice that [fol. 11] the defendants would and did cause Triumph to furnish Elk Mills with all the necessary services and supplies to carry out the contracts, to-wit, employees, lights, heat, water, power, telephone, stenographic services, accounting services, watchman and guard services, to be utilized in connection with the manufacture, assembling and loading of the ordnance material which Elk Mills had previously agreed to manufacture, load and assemble for Triumph.

17. It was a further part of said scheme and artifice that the defendants would and did between the period, April 22, 1942 and July 30, 1942, cause Elk Mills to pay Sidney M. Feldman, Gustav H. Kann, John J. Prial, Arthur Deibert, and William L. Kann, Jr., each a salary of \$3,000, Victor G. Willis, Jr., a salary of \$4,000, and Joseph Ben Decker a salary of \$1,900, and that the defendants would and did cause Elk Mills, on June 20, 1942, to pay to each of the defendants a bonus of \$5,000.

18. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said defendants on or about June 30, 1942, at Baltimore, in the District of Maryland, and within the jurisdiction of this Court, for the purpose of executing said scheme and artifice and attempting so to do, unlawfully, willfully, knowingly, and feloniously, cause to be delivered by mail of the United States, according to the direction thereon a certain writing, to-wit, a check, drawn by Elk Mills Loading Corporation on the Peoples Bank of Elkton, Maryland, which said check had lately before been placed in the Post Office of the United States at Pittsburgh, Pennsylvania, in a postpaid envelope for delivery by the Post Office establishment of the United States, [fol. 12] a photostatic copy of which said check was and is as follows, to-wit:

(Here follows 1 Exhibit)

FRONT

No. 7

ELKTQN, MD. June 30, 1942

\$ 5,000.00

PAY Five thousand and no/100 dollars

TO THE ORDER OF THE PARTY NAMED BELOW

ELK MILLS LOADING CORPORATION

G. H. Kapp

Pittsburgh, Pennsylvania

PEOPLES BANK OF ELKTON 65-286

Bonus as declared
May 27th, 1942.

ENDORSEMENT OF THE PAYEE IS ACKNOWLEDGED
BY FULL PAYMENT OF ACCOUNT AS LAST
BY NO OTHER RECEIPT REQUIRED.

BACK

PAY TO THE ORDER OF
MY BANK, BANKER OR TRUST CO.
OR RECEIVED PAYMENT THROUGH THE
BALTIMORE CLEARING HOUSE
PRIOR ENDORSEMENTS GUARANTEED

JUL 10 1942

BALTIMORE BRANCH
FEDERAL RESERVE BANK
7-27 OF RICHMOND 7-27

PAY TO THE ORDER OF
ANY BANK, BANKER OR TRUST CO.
FROM RICHMOND, D.C.
FARMERS DEPOSIT NATIONAL BANK
PITTSBURGH, PA.
JUL 11 M. F. BOYD, CASHIER

JUL 9 1942

By order of
Farmers Deposit
National Bank
Richard Bank
G. H. Kapp

against the peace of the United States and their dignity and contrary to the form of the Statute of the United States in such case made and provided. (Title 18, Section 338, U. S. Code).

[fol. 13]

Count II

1. And the Grand Jurors aforesaid upon their oaths aforesaid do further reaffirm, reallege, and restate as if fully set forth in this count each and every allegation contained in Count I except the allegations set forth in paragraph 18 of said first count.

2. And the Grand Jurors aforesaid upon their oaths aforesaid do further present that the said defendants on or about July 22, 1942, at Elkton, Cecil County, in the District of Maryland, and in the jurisdiction of this Court, for the purpose of executing said scheme and artifice, unlawfully, willfully, knowingly, and feloniously placed and caused to be placed in the Post Office of the United States in Elkton, Maryland, to be sent and delivered by the Post Office establishment of the United States, a certain writing, to-wit, a check, which said writing and check then and there was and is in words and figures as follows, to-wit:

(Here follows 1 Exhibit)

FRONT

NO RECEIPT REQUIRED RETURN IF NOT CORRECT THIS CHECK PAYS IN FULL THE FOLLOWING ITEMS		
DATE	INVOICE	AMOUNT
7/22/42		
Payment in full for		
Lumber used on Elk		
Mills Loading bldgs.		

STEPHEN R. JACKSON & COMPANY

GENERAL CONTRACTORS
810 ORANGE STREET

No. 7671

WILMINGTON, DEL. July 22 1942

PAY TO THE ORDER OF Messrs. D. Abbott, Waldman, Mann, & Co. \$12,000.18

Twelve Thousand Sixty-two and 18/100 DOLLARS

INDUSTRIAL TRUST COMPANY

62-14

WILMINGTON, DEL.

Stephen R. Jackson

BACK

Handwritten signatures and notes on the back of the check, including "Paid" and "V. J. Jackson".

Handwritten text and stamps on the back of the check, including "PAID" and "JUL 23 1942".

[fol. 14] against the peace of the United States and their dignity and contrary to the form of the Statute of the United States in such case made and provided. (Title 18, Section 338, U. S. Code).

Count III:

1. And the Grand Jurors aforesaid upon their oaths aforesaid do further reaffirm, reallege, and restate as if fully set forth in this count each and every allegation contained in Count I except the allegations set forth in paragraph 18 of the said first count.

2. And the Grand Jurors aforesaid upon their oaths aforesaid do further present that the said defendants on or about June 30, 1943, at Elkton, Cecil County, in the District of Maryland, and in the jurisdiction of this Court, for the purpose of executing said scheme and artifice, unlawfully, wilfully, knowingly and feloniously caused to be delivered by mail of the United States, according to the direction thereon, a certain writing, to wit, a check, drawn by Elk Mills on the Peoples Bank of Elkton, Maryland, which said check had lately before been placed in the Post Office of the United States at Newark, Delaware, in a postpaid envelope for delivery by the Post Office establishment of the United States, a photostatic copy of which check was and is as follows, to wit:

FRONT

No. 8

ELKTON, MD. June 30, 1942

\$ 5,000.00

~~PAY Five thousand and no/100 dollars~~

TO THE ORDER OF THE PARTY, NAME BELOW

WALK MILLS LOADING CORPORATION ACCOUNT #1 - GENERAL

V. G. Willis, Jr.

Elkton, Maryland

PEOPLES BANK OF ELKTON 65-286

Bonus as declared
May 27th, 1942.

ENDORSEMENT BY THE PAYER IS ACKNOWLEDGEMENT IN FULL PAYMENT OF ACCOUNT AS LISTED. NO OTHER RECEIPT REQUIRED

BACK

20618-700

THE PHILADELPHIA NATIONAL BANK

15

[fols. 15-18] against the peace of the United States and their dignity and contrary to the form of the Statute of the United States in such case made and provided. (Title 18, Section 338, U. S. Code).

Bernard J. Flynn, United States Attorney; Wm. A. Paisley, Special Assistant to the Attorney General. Ellis L. Arenson, Special Attorney, Department of Justice.

The foregoing Indictment endorsed as follows:

—“A true bill, F. Furniyal Peard, Foreman”.

[fols. 19-34] IN UNITED STATES DISTRICT COURT

VERDICT—October 7, 1943

And, thereupon, the said jurors being empaneled and sworn to say the truth in the premises, upon their oath, do say that the said Gustav H. Kann is Not Guilty of the premises charged in the first count aforesaid and Guilty of the premises charged in the second and third counts aforesaid and laid to his charge in the manner and form as by the said Indictment is charged upon him.

[fol. 35] IN UNITED STATES DISTRICT COURT

JUDGMENT—October 30, 1943

Therefore, it is considered by the Court here that the said defendant Gustav H. Kann, be committed to the custody of the Attorney General of the United States for imprisonment in such place of confinement as he may designate for the period of Three Years and to pay a fine of Two Thousand Dollars and costs without commitment in default of payment of said fine.

Memorandum: Verdict was rendered on the 7th day of October, 1943, and Judgment entered on the 30th day of October, 1943.

[fol. 36] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MARYLAND

No. 19993 Criminal Docket

UNITED STATES OF AMERICA

vs.

GUSTAV H. KANN, JOSEPH BEN DECKER, SIDNEY M. FELDMAN, William L. Kann, Jr., John J. Prial, Victor G. Willis, Jr., Arthur Deibert

Bill of Exceptions

Filed November 23, 1943

The above entitled cause came on for trial on the 4th day of October, 1943, before the Honorable W. Calvin Chesnut, one of the Judges of said Court, and the following proceedings were had:

—APPEARANCES:

On behalf of the United States,

Bernard J. Flynn, Esq., United States Attorney.

William A. Paisley, Esq., Special Assistant to the Attorney General.

Ellis L. Arenson, Esq., Special Assistant to the Attorney General.

On behalf of the Defendants, Gustav H. Kann and William L. Kann, Jr.,

Simon E. Sobeloff, Esq.,

On behalf of the Defendant, Joseph Ben Decker,

William Curran, Esq.,

R. Palmer Ingram, Esq.,

[fol. 37] *On behalf of the Defendants, Sidney M. Feldman, John J. Prial, Victor G. Willis, Jr., and Arthur Deibert,*

G. C. A. Anderson, Esq.,

Omar D. Crothers, Esq.

PLEAS

Gustav H. Kann pleaded not guilty; the remaining defendants entered pleas of nolo contendere.

Mr. Paisley opened the case to the jury on behalf of the United States, and was followed by Mr. Sobeloff on behalf of the defendant, Gustav H. Kann.

Thereupon:

[fol. 38] The Court: Call your first witness, Mr. Paisley.

OFFERS IN EVIDENCE

Mr. Paisley: I would like to offer in evidence the certificate of incorporation of the Elk Mills Corporation.

Mr. Sobeloff. No objection.

(Certificate of Incorporation marked and filed in evidence as Government's Exhibit 1.)

Mr. Paisley: Gentlemen, it is not necessary to read this certificate at length. You gentlemen are familiar with corporate certificates.

(Certificate read to Court and jury by Mr. Paisley.)

The Court: What is the date?

Mr. Paisley: Second of December, 1941, your Honor. Certified by the Secretary of the State of Maryland. Now, I have the minutes, Mr. Sobeloff, of both corporations here. I do not think either side will want to put them all in, but I [fol. 39] now would like to offer the minutes of December 11, 1941.

Mr. Sobeloff: No objection.

Mr. Paisley: And of March 17, 1942. Any objection?

Mr. Sobeloff: No objection.

(Minutes referred to marked and filed in evidence as Government Exhibit 2 and Government Exhibit 3, respectively.)

Mr. Paisley: All right, sir. Now, the dates of the minutes, so nobody will have any misunderstanding, December 11, 1941, March 17, 1942, directors' meetings.

[fol. 40] Mr. Arrenson: All right, sir. Triumph Explosives, Inc. I am reading from the minutes of December 11, 1941:

Pursuant to notice duly mailed to all directors on December 8, 1941, a special meeting of the board of directors of

Triumph Explosives, Inc., was held at the office of the company near Elkton, Maryland, on December 11, 1941, at 11 o'clock a. m. Present: Gustav H. Kann, Joseph B. Decker, William L. Kann, R. V. Criswell, constituting a majority of the board of directors and a quorum:

The Court: Give me those names again.

Mr. Arrenson: Gustav H. Kann, Joseph B. Decker, William L. Kann, R. V. Criswell.

The Court: You say that is a majority of the directors of the Triumph Explosives?

Mr. Arrenson: Yes, sir. It is so stated here.

The Court: All right. Go ahead.

Mr. Arrenson (Reading): Mr. A. Leo Weil, Jr., of Weil, Chrisie and Weil, Pittsburgh, Pennsylvania, attorneys for the company, was also present.

[fol. 41] Mr. Gustav H. Kann presided, and Mr. R. V. Criswell acted as secretary of the meeting. Mr. Decker called the meeting's attention to the fact that Triumph had been awarded a contract No. W-608-CWS-255, dated November 27, 1941, with the Chemical Warfare Service of the War Department of the Federal Government, which contract called for the manufacturing, loading, assembling and storing of ordnance material identified as "incendiary bombs." Mr. Decker further explained that the performance of said contract by Triumph would necessitate a considerable capital expenditure on the part of the company for the acquisition of additional land, the erection of buildings, and the purchase of machinery and equipment for the performance of such work. Mr. Decker further stated that he had been advised and informed that under the existing loan agreement between the company and the People's Pittsburgh Trust Company and Federal Reserve Bank of Cleveland, the company was not permitted to make any further or additional capital expenditures without the prior consent of said banks, and that the banks had indicated their unwillingness to approve or assent to any further or additional capital expenditures. Mr. Decker further stated to the meeting that a number of the company's younger key employees had indicated that they were desirous of leaving the employ of the company and forming a corporation to engage in business for themselves, and that, in fact, some of said employees had already caused to be formed a Maryland corporation under the name of Elk Mills Loading Corporation. The aforesaid employees

who were involved, Mr. Decker stated, were Sidney Feldman, John Prial, Victor Willis, Arthur Deibert and W. L. Kann, Jr. Mr. Decker further stated that were the company to lose the services of the aforesaid employes it would be severely handicapped, and the performance of contracts for the United States Army and Navy would be greatly impeded until other men to take their places could be found and trained. Mr. Decker stated that he felt the situation was one of the utmost seriousness to the company and asked for suggestions as to how the services of these men could be retained and how the company could carry out the incendiary bomb contract in view of the position taken by the banks. In this later connection Mr. Decker pointed out that the company would lose a tremendous amount of [fol. 43] prestige and confidence which it now enjoyed on the part of Governmental representatives were the company to attempt to have the incendiary bomb contract cancelled or abrogated. After a thorough discussion of the matter, Mr. Weil stated that it was his opinion that the company could sublet the work to be performed under the incendiary bomb contract to the Elk Mills Loading Corporation, and that if Triumph Company obtained an advance from the Government on account of said contract, Triumph, in turn, could make advance payments against future deliveries on the subcontract with the Elk Mills Loading Corporation, these advance payments to be employed by the Elk Mills Loading Corporation for the purchase of the necessary machinery and equipment. Mr. Weil stated that it was his opinion that so to do would not violate the terms and conditions of the loan agreements between Triumph and the banks. After further discussion it was proposed that negotiations be entered into with the employes who had caused the Elk Mills Loading Corporation to be incorporated and who were proposing to leave the employ of the company, to ascertain if they would continue [fol. 44] to remain in the employ of Triumph under the following arrangements: the aforesaid individuals to acquire personally a suitable site for the erection of a plant by the Elk Mills Loading Corporation, such individuals to receive 45 per cent of the stock of the Elk Mills Loading Corporation in consideration of their transferring or causing to be transferred to said company real estate free and clear of all encumbrances, and the other 55 per cent of the stock of said company to be issued to Triumph in considera-

tion of Triumph's entering into a contract with Elk Mills Loading Corporation whereby Elk Mills Loading Corporation would perform all of the work required for the loading, assembling, packing and the storing of incendiary bombs in connection with the terms of the contract between Triumph and the Chemical Warfare Service at a unit price of 343395 cents. In addition, Triumph to agree that in the event it obtains an advance from the Government on account of said incendiary bomb contract, that so far as it is permitted so to do it will make advance payments against future deliveries to Elk Mills, such advance payments to be used by Elk Mills to purchase the necessary tools, machinery, [fol 45] equipment, raw materials and labor for the performance of said contract.

Mr. Kann and Mr. Decker were thereupon requested to confer with the employes of Triumph aforesaid, and the meeting was thereupon adjourned to convene at two o'clock in the afternoon, after Mr. Decker and Mr. Kann had had an opportunity to confer with said employes. The meeting reconvened at 2 p. m., the same directors being present, and in addition thereto, Mr. Weil. Mr. Kann and Mr. Decker reported to the meeting that they had conferred with the employes and were happy to report that the plan as above outlined had met with the approval of such employes, who had agreed and consented to all terms and conditions as above set forth. Thereafter it was suggested that before the plan as outlined was consummated, Mr. Kann and Mr. Weil, as attorneys for the company, should discuss the same with the banks, with the understanding that the plan should be immediately consummated if the banks had no objections thereto.

1 On motion duly made, seconded and carried, it was unanimously: Resolved, that subject to the People's Pittsburgh [fol 46] Trust Company and Federal Reserve Bank of Cleveland having no objection thereto, this company enter into an agreement with Elk Mills Loading Corporation, whereby this Company is to receive 55 per cent of the stock in the Elk Mills Loading Corporation in consideration of this company subletting the work to be performed under its contract with Chemical Warfare Service for the loading, assembling, packing and storing of incendiary bombs at a unit price of 343395 cents, with the further provision that if Triumph receives an advance payment on said contract from the Government, then so far as it is permitted so to

do, Triumph will make advance payments to Elk Mills on account of future deliveries, such advance payments to be used by Elk Mills for the purchase of machinery, tools, equipment, raw materials and labor necessary for the performance of work under said contract, and provided further that Elk Mills shall issue or cause to be issued 45 per cent of its stock to Messrs. Sidney Feldman, John Prial, Victor Willis, Arthur Deibert and William L. Kann, Jr., in consideration of said individuals transferring or causing to be transferred to said Elk Mills Loading Corporation free [fol. 47] and clear of all liens and encumbrances, land sufficient and suitable for the erection of an assembly and loading plant.

And Be It Further Resolved that upon a report being received from Mr. Kann or Mr. Weil that the People's Pittsburgh Trust Company and or Federal Reserve Bank of Cleveland have no objection to the aforesaid plan, the proper officers of this corporation be and they are hereby empowered and directed to cause said plan to be consummated and in consideration therewith to execute for and on behalf of this company such papers, contracts and agreements as in the opinion of said officers are necessary or proper for the consummation of said plan.

There are other matters, your Honor, but we are not interested in those. I now read from the minutes of March 17, 1942:

Pursuant to notice duly mailed to all directors on March 14, 1942, a special meeting of the board of directors of Triumph Explosives, Inc., was held at the office of the company near Elkton, Maryland, on Tuesday, March 17, 1942, at 11 o'clock a. m. Eastern War Time.

[fol. 48] Present: Gustav H. Kann, Joseph B. Decker, Col. A. P. Shirley, Van Dyk MacBride, R. V. Criswell, constituting a majority of the board of directors, and a quorum. Mr. Gustav H. Kann presided and R. V. Criswell acted as secretary of the meeting.

Then other matters ensued and we finally reach the point we are interested in:

Mr. Decker explained to the meeting that a number of difficulties had arisen and complications occurred in connection with carrying out the agreement previously entered into between the company and Elk Mills Loading Corpora-

tion, under which contract Triumph had subcontracted to Elk Mills Loading Corporation the loading, assembling and packing of incendiary bombs under a contract which Triumph had obtained from Chemical Warfare Service. Mr. Decker pointed out that great confusion had arisen as to whether employees performing the work provided by such contract were employees of Elk Mills Loading Corporation or of Triumph. He explained that it was practically impossible for Elk Mills Loading Corporation to employ employees for the performance of said contract, and then lay [fol. 49] them off and then have Triumph thereafter employ them, without causing tremendous confusion. He also called attention to the fact that in other phases in connection with the performance of the contract there were also duplications, such as watchmen and guards, accounting services, light, heat and power, and the like. As a result of all of these difficulties and complications which had been experienced on the part of both companies in the performance of the work under the contract, the representatives of both companies had agreed that it would be to the mutual interest of each to amend the previous contract so as to eliminate these points of confusion as well as elements of duplication. Mr. Decker submitted to the meeting a proposed agreement amending the previous contract between Triumph and Elk Mills, the chief points as amendments being:

1. That Triumph would furnish Elk Mills its own employees who would perform all of the work in connection with the loading, assembling, packing and storing of incendiary bombs, such employees, of course, to work under the supervision and direction of the officers and consultants of Elk Mills, and that Elk Mills would reimburse Triumph [fol. 50] for the cost of all labor so furnished.

2. Triumph would furnish Elk Mills with light, heat, water and power, also telephone, stenographic, accounting and watchman and guard services, as well as office space, for which services and facilities Elk Mills would pay Triumph at the price of five cents per bomb. After thorough discussion, upon motion duly made, seconded and unanimously carried, it was, Resolved, that the proposed contract between this company and Elk Mills Loading Corporation amending the previous contract between the two companies pertaining to the loading, assembling, packing

and storing of incendiary bombs, be and the same is hereby ratified and approved.

And Be It Further Resolved that the proper officers of this company be and the same are hereby empowered and directed to execute such contracts for and on behalf of this corporation, and that a copy of such contract be attached to and be made a part of the minutes of this meeting.

[fol. 51] Thereupon

VAN DYK MACBRIDE

Direct examination.

By Mr. Paisley:

Q. You are Mr. Van Dyk MacBride?

A. Yes sir.

Q. Where do you live, Mr. MacBride?

A. I live in the town of Nutley, New Jersey.

Q. What is your business?

A. I am president of MacBride, Miller & Company, dealers in investment securities, located in Newark, New Jersey.

Q. Were you ever a director of Triumph Explosives, Incorporated, at Elkton, Maryland?

A. I was.

Q. During what period of time did you so serve?

[fol. 52] The Witness: I was elected a director on November 26, 1940, and resigned on October 23, 1942.

Q. Who were your fellow directors, who were the other directors?

A. During that period?

Q. Yes.

A. Relying on recollection, Mr. G. H. Kann, Mr. W. L. Kann, Mr. J. B. Decker, Mr. R. V. Criswell, Mr. Diamondstone, whose initials escape me at the moment, and Colonel A. P. Shirley.

Q. Through your firm of MacBride and other companies did you market some of the stock?

[fol. 49] A. We were the underwriters of both of the companies of two issues of stock which were sold to the public.

Q. Can you tell us generally to what extent the stock was sold to the public?

A. They were sold very broadly to the public through a syndicate of securities dealers which we organized and through the two sales, one of which was—the first of which was in May of 1928, beginning then, and the second one in November—I said 1928. Let me refer again to my memorandum. The first distribution was 150,000 shares in May, 1928, and the second 140,000 shares in November, 1939, and we employed a group of dealers all over the country, and that stock was distributed to the public after registration with the SEC as required by law.

[fol. 54] Q. Mr. MacBride, when did you first learn of the corporation known as Elk Mills Loading Corporation?

A. To the best of my recollection, the name was first mentioned at the directors' meeting that was held on October 1, 1942.

Q. Who were present at that meeting?

A. I think from memory—I don't know, Mr. Kann, Mr. G. H. Kann, Mr. Will Kann, Mr. Decker, Colonel Shirley and myself. That may not be a hundred per cent accurate, but I believe it is.

Q. Do you definitely remember that Colonel Shirley was there?

A. Indeed, I do.

Q. Tell the Court and jury just what happened at that time.

[fol. 55] Q. Mr. MacBride, tell us, were you present at that meeting on March 17, 1942, when the discussion took place about Elk Mills?

A. I was present at that meeting; yes.

The Court: Were you there during the whole meeting?

The Witness: Substantially. I may have been excused for a brief period during the meeting. I don't recall that, your Honor.

The Court: Where did the meeting take place?

The Witness: When?

The Court: Where, I said?

The Witness: At the company's offices in Elkton, Maryland.

The Court: Do you remember who else was present at that particular meeting?

The Witness: March 17th?

The Court: Yes.

[fol. 56] The Witness: The reading of the minutes a moment ago refreshed my memory. I should say that was correct as to who were present, but it is my recollection, purely. That is quite a little while ago now.

The Court: Do you mean to say you never heard of anything that has been read in these minutes about the Elk Mills?

The Witness: No, I never heard of it.

[fol. 57] The Court: Well, you say you have no recollection at all of hearing about Elk Mills Company before this October, 1942?

The Witness: I had never heard the name of the company, sir; no.

The Court: Go ahead, Mr. Paisley.

By Mr. Paisley:

Q. Will you just tell us in your own way what transpired at that meeting of October 1st, 1942?

A. The meeting of October 1st was a lengthy one. The company's auditor, Mr. Sabel, was present. He stated that an audit of the company's books was being made by a representative of the Navy Department, that certain things set forth therein were objected to or questioned and he gave us a list of the things that were objected to or questioned and asked that the directors consider doing some-
[fol. 58] thing about them. In that list of things was the question of the relation of a company called Elk Mills Loading Company, a subsidiary, and certain other subsidiary companies, as I recall it. I never having heard of Elk Mills Loading Company or of the other subsidiary companies, with the single exception of one which was not under discussion and which had long been a subsidiary, the Central Railway Signal Company, stated that I had not

heard of Elk Mills or the others, and asked what they were and was told that they were subsidiaries of the company. Every one in the room seemed to know of them except me and possibly Colonel Shirley, who was sitting next to me, and I asked the colonel if he knew anything about these companies, and he said he knew nothing of them, either. I thereupon said that so far as I was concerned, that on my own responsibilities as a director that I would like to go ahead and have the rest of the recommendations of the auditor presented and considered, but then I would like to have the meeting adjourned for a week, during which time I would like to see minutes covering all of these recommendations, including the Elk Mills and other subsidiaries [fol. 59] which were then named, and at the adjourned meeting a week later I hoped in some way to straighten out these things, which I was then hearing of for the first time, many of them immediate requirements of the Navy Department as expressed to us through our Auditor. Is that a fairly complete statement, sir?

Q. That is substantially what I had in mind. I take it that Mr. G. H. Kann was present during the meeting of October 1st?

A. Mr. Kann was present; yes, sir.

Q. And did you reassemble on October 7, 1942?

A. We did, sir.

Q. Was Colonel Shirley back for that meeting, too?

A. I beg your pardon?

Q. Did Colonel Shirley come to that meeting?

A. Colonel Shirley was there also.

Q. Did he come with his attorney, Mr. Townsend?

A. Yes.

Q. Was Mr. G. H. Kann present?

A. Yes.

Q. Was W. L. Kann present?

[fol. 60]. A. At the October 7th meeting?

Q. Yes.

A. I believe so. Yes, Mr. W. L. Kann was present. I have now a list.

Q. Who else was there?

A. Mr. J. B. Decker, Colonel Shirley, Mr. Diamondstone, Mr. Criswell and myself, which were all of the directors.

Q. What action was taken by the board with reference to this Elk Mills Loading Corporation?

The Court: Well, in the meantime, had you learned anything about it?

The Witness: In the meantime the discussion at the preceding meeting had continued, and I had learned a little more of it, of the formation of this company, and I had heard of the incident of the sale of the company to the—the sale of the property to the key men, and I questioned the wisdom and the advisability of it. Having heard of it for the first time, I could not go into details, or give a detailed analysis, and I was told that was going to be very promptly settled, that the key men were to return their [fol. 61] stock—these two meetings, if I may, your Honor, become a little confused. They were a week apart; they continued a long time, each of them, and something that might have occurred at one was carried over into the second, but substantially that is what occurred. Then, as has been related here, the Elk Mills omelet was unscrambled by the return of the stock to the company and by the young men, or the key men, being compensated in some manner, at least, by increasing their salaries at Triumph. I may say I was convinced that that was only fair to them.

Q. Mr. MacBride, did you offer any resolution, or was there a resolution offered on your behalf with reference to the March 17, 1942, minutes?

A. I did, sir. There having obviously been transactions recorded in the minutes at a meeting at which I was present, or thought I was present, during the entire time, and continuing so, and Colonel Shirley, who I met in the interim between these two meetings, having agreed with me that it was the same case with him, we had a resolution of which I have a copy here, we had a resolution introduced that was passed, stating that neither Colonel Shirley nor [fol. 62] I were present at the meetings in which Elk Mills was discussed or certain other matters.

Mr. Sobeloff: I think Mr. MacBride is mistaken, and I am sure honestly mistaken. The minutes did not read that way at that time, not that he was not present at the meeting but that he was not present at the discussion. That may be an important difference.

The Court: You do have a resolution?

The Witness: The resolution, as I have it, is, Resolved, that the minutes of the special meeting of the directors held on March 17, 1942, be amended by showing that at

the time of the discussion and action taken in regard to Elk Mills Loading Company—there I have a note. Whether anything else was inserted afterwards or not, I don't know. This is a draft, but the original minutes are here. But neither Mr. A. P. Shirley nor Mr. Van Dyk MacBride were present nor were they until recently informed or advised of the Elk Mills Company's formation or staffs. Further, that said minutes be amended by showing that said Messrs. Shirley and MacBride left the said meeting of March 17, 1942, before its termination and before discussion of either [fol. 63] the Elk Mills Loading Company or bonus matters.

In answer to your earlier question, your Honor, I would like to state I can not make a definite statement. It is entirely possible I returned to New York or Newark and Colonel Shirley to Washington. It is entirely possible that we left believing the business of the day had been completed to catch a train or something.

By Mr. Paisley:

Q. Mr. MacBride, when did you resign as director of the Triumph Explosives?

A. On October 23rd, I think it is, October 23rd, 1942.

Q. Did the other directors resign at the same time?

A. We all resigned at the same time by request.

Q. Do you recall the date that the Navy Department took over the operation of the plant of Triumph?

A. Not of my own knowledge. I was told it was October 13th. I was not present. I would not know the date. October 13th, I believe.

[fol. 64] Q. Mr. MacBride, in your testimony, in the beginning of it, you said that you were present at the meeting of October 7th, that you were there substantially, I think was the expression you used, substantially the whole time?

A. Do you mean October 7th?

Q. No, I mean March 17th. I thank you for the correction. Now, having read the resolution which you yourself offered, and which was adopted on October 7th, pertaining to that March meeting, would you want to modify that statement?

A. I did modify it a moment ago, but I could not modify it any further.

Q. Then what was written in that resolution that you offered was the fact?

A. The resolution about amending the minutes?

Q. Yes.

A. Stating we were not present when these matters were discussed.

Q. Yes, and also that you left before the adjournment. Doesn't your resolution which you offered say that Messrs. Shirley and MacBride left the meeting of March 17, 1942, [fol. 65] before its termination. Doesn't it say that?

A. That is correct.

Q. And that is a fact, is it not?

A. To the best of my knowledge.

Q. Do you recall you did not leave because you had to take a train back to Newark?

A. I have already stated that might have been the case, and we might well have left before the actual termination of the meeting.

Q. You don't attach any special significance to that. That is the way it happened. You just had to leave and you left before the adjournment?

A. I have said that it is my impression that it could have been just that way. Beyond that I am unable to analyze what I thought.

Q. And that is what you adopted as your version and offered as a resolution in October?

A. Substantially, yes.

Q. Not substantially, actually. Those are your words, are they not, that is your resolution?

A. This is the resolution and I have told you I believe [fols. 66-67] the meeting had terminated—we believed the meeting had terminated or we had to catch a train, we had to leave, and it is quite as I stated here. However, these matters were not discussed in my presence and I never heard of them before.

Q. I am not disputing that. I just wanted to be sure that the jury understood the little revision, which may be an important one, that you make. You don't want to give the impression that you were there during the entire meeting and no such discussion took place as the minutes recite. The fact is, as you stated in your resolution in October, that at this March meeting you were compelled to leave before the adjournment, and before you left, this discus-

sion had not taken place, and you wanted that recorded as a fact?

A. The discussion did not take place while I was present at the meeting.

Q. And you did not stay for the entire meeting, you left before this adjournment?

A. Apparently, we did.

[fol. 68] Redirect examination.

By Mr. Paisley:

Q. Mr. MacBride, I have these minutes of March 17, 1942, before me and they indicate that after the discussion about Elk Mills the subject of Atomite Corporation was taken up. Do you recall any discussion of Atomite Corporation at that meeting of March 17th?

A. No, I do not.

The Court: Mr. MacBride has spoken about some other subsidiaries. Are they mentioned at this meeting?

Mr. Paisley: Not at this March 17th meeting. They were, as I understand it, at the meeting of October 1, 1942.

Q. Is that right?

A. Yes, sir.

[fol. 69] Q. Now, I notice the next thing in order in the Minutes of March 17, 1942, is the matter of bonuses to be paid to G. H. Kann, W. L. Kann and J. B. Decker for the six months period ending January 31, 1942, for \$111,483.27. Were you present, if any such discussion took place?

Mr. Sobeloff: You don't have to ask him that because this resolution which was offered for him and adopted in October says he left before the end of the meeting, before the termination of the meeting, before the discussion of either Elk Mills Loading Corporation or bonus matters. I assume that is the answer and there is no dispute about it.

Mr. Paisley: We are going over the Minutes chronologically to see how they read and see if he was present when business was transacted after the Elk Mills business was discussed.

Q. Now, the last item in the Minutes reads this way: "Colonel Shirley made report to the meeting of his investigation concerning matter of tires and rubber. After making many contacts in Washington on this matter, Colonel [fol. 70] Shirley was able to get no definite, concrete in-

formation whatever, and was advised to await the results of investigation of Glenn J. Martin and Fairchilds, who are presently engaged in trying to secure definite advice as to how the rubber requirements for their industries will be cared for. There being no further business, the meeting adjourned." Do you recall Colonel Shirley making that report?

A. I do, sir.

Q. What is that?

A. I do recall him saying something about tires.

Q. Did the meeting then adjourn, or do you remember?

A. I can not recall with the exactitude that perhaps I should, at what point that report of Colonel Shirley's was made, or at what point, as this resolution reads, I left before the termination of the meeting. I can only state I did not hear the Elk Mills or the bonus matter discussed at the meeting.

Mr. Paisley: That is all.

Recross-examination.

[fol. 71] By Mr. Sobeloff:

Q. Or Atomite?

A. Or Atomite.

Q. You did know something about Atomite, that wasn't a new thing at that meeting. Atomite is a subsidiary, is it not, of Elk Mills, Atomite Incorporated?

A. I have no knowledge of that. I don't believe you are correct in that, but I have no knowledge of that. You will have to ask one of the officers of the Corporation.

Q. Didn't you market some stock?

A. No.

Q. Didn't you file some papers with the SEC for the sale of stock of Atomite?

A. No.

Q. Didn't you issue a prospectus concerning that?

A. Concerning only Triumph Explosives.

Q. Did you in that prospectus mention Atomite?

A. As one of the products, yes.

Q. That is what I am getting at.

A. Yes.

[fol. 72] Q. So you knew that Triumph had some interest in this Atomite?

A. Oh, indeed, sir.

Q. And that corporation had been formed to sell or manufacture and market atomite?

A. That I did not know.

Q. Doesn't your prospectus say that?

A. No.

Q. Do you happen to have a copy of that?

A. Yes, I have a copy of it.

Q. Let us look at it and see what it does say about atomite. Show me what it does say about atomite.

A. We mentioned atomite as a product of the company, Mr. Attorney, and that is all.

Q. What did you say?

A. I think we mentioned atomite as a product of the company, and in this prospectus had not even mentioned it. This is a late prospectus.

Q. In which one did you mention it?

A. There were three.

Q. Three prospectuses that did mention it?

[fol. 73] A. Oh, no, three prospectuses.

Q. Which one mentioned it?

A. I admit clearly what I have already said. I knew of atomite, that the Company was working on a product called atomite and had high hopes for it, but I never knew, and did not know, as a matter of fact, until this minute, that a separate company was formed to produce or market it.

Q. And yet, although you knew of atomite, you are clear in your recollection that atomite was not even mentioned at that meeting while you were there?

A. To the best of my recollection, no, sir, it was not mentioned.

Q. When you say that now, to the best of your recollection, are you willing to swear that it was not mentioned while you were there?

A. No, I am not willing to swear to that. Prospectus dated November 10, 1939: "During the last year considerable time, expense and money of the Company was expended investigating and developing a patented explosive Atomite." There is nothing said about organization.

[fol. 74] Q. It does not say anything about organizing a separate company?

A. No.

Q. But it does say they were working on this Atomite?

A. Sure.

Q. May I have that? Could you separate them?

[fol. 75] Q. When you raised this question about the March meeting at the October meeting, it was October first, was it not?

A. When I raised what question?

Q. About the point at which you left and the fact that you had left before Elk Mills was discussed.

A. October first.

Q. That was seven months later, or six and a half months later.

A. That is quite right.

[fol. 76] Q. Let's get a little better picture of it. What was the situation then? October first was less than two weeks before the Government took over?

A. Yes.

Q. And the Government auditors were already there?

A. Yes.

Q. And they had already raised some question about Elk Mills? Isn't that right?

A. Yes.

Q. At that very meeting you say Mr. Sabel reported that the Government had raised some question about Elk Mills?

A. Yes.

Q. Was there any dispute or difference of opinion among the directors on October first as to the action to be taken about Elk Mills?

A. There was no dispute or difference. There was an effort to straighten out the matter, if possible.

Q. All of the directors at that time were of the same view that you were?

A. I hadn't expressed any view at that time.

Q. I am talking about October first, the meeting that [fol. 77] you did attend and at which the action was taken that you told us about, namely, cancelling the stock of the key men or taking over the stock of the key men for Triumph.

A. I believe that was the October 7th meeting.

Q. Very well, then, the October 7th meeting. Wasn't that a unanimous action of the Board, arrived at harmoniously as between you and the other members of the board?

A. The board was not asked to take any action on that. It was entirely something done between the officers of the company and the officers of this so-called Elk Mills Company. It was merely reported to us.

Q. I am talking about the meeting of October 7th, when it was reported that the men who had 45 per cent of the stock of Elk Mills were to turn it over to Triumph.

A. I believe that the opinion of the board was that that was the proper step to take.

Q. All of them?

A. Yes, all of us, so far as we understand the circumstances at that time, that seemed to be obviously the right thing to do to get the eggs unscrambled.

The Court: Did you attend meetings of the Board between March 17, 1942 and October, 1942, about Elk Mills?

The Witness: I was present at only one between those dates you asked me—on July 24th; and at that time there was no discussion about Elk Mills. I had never heard about Elk Mills, as I testified, until the October first meeting.

Redirect examination.

By Mr. Paisley:

Q. Mr. MacBride, as I understood your testimony on cross-examination, you said that you were not swearing or would not swear that Atomite was not mentioned at that meeting. Is that correct?

A. I just can't recall.

Q. Of course you are swearing to all of these answers; but you swear that there was not a lengthy discussion of this Atomite Corporation?

The Court: Do I understand the minutes referred to the incorporation of an Atomite Company?

Mr. Paisley: Yes; two or three pages.

The Court: It did become a subsidiary?

Mr. Paisley: I don't know what happened, Your Honor. I don't know.

[fols. 79-82] The Witness: No.

Mr. Paisley: I was not interested in it in this case.

The Court: You are asked, Mr. MacBride, whether Atomite was mentioned at this meeting of March 17th, whether there was any lengthy discussion of it, or the formation of a company with regard to it.

Mr. Paisley: In other words, I can understand why a witness would not swear that a subject was not mentioned, but he might be able to swear that there was no lengthy discussion of it.

The Court: Ask him the question in your own way.

By Mr. Paisley:

Q. Do you recall any lengthy discussion of this Atomite Corporation?

A. No.

Q. You are positive of that?

A. I beg your pardon.

Q. You are positive of that?

A. I am positive.

[fol. 83]

A. P. SHIRLEY

Direct-examination.—

By Mr. Paisley:

Q. Colonel Shirley, can you hear me when I speak in this tone of voice?

A. How is that?

Q. Can you hear me when I speak in this tone of voice?

A. Yes.

Q. What is your occupation?

A. Mechanical engineering.

Q. Where is your place of residence?

A. Mt. Vernon, Virginia.

Q. Have you ever had any connection with Triumph Explosives, Inc.?

[fol. 84] A. Yes, sir.

Q. I believe you were a director of that corporation.

A. Yes, sir.

Q. During what period of time?

A. From its inception up until the resignation of October of 1942.

Q. Did you resign when Mr. MacBride resigned?

A. Yes.

Q. When did you first learn of Elk Mills Loading Corporation?

A. October first.

Q. Were you present at a meeting on March 17, 1942?

A. Yes, sir.

Q. Did you hear any discussion at that meeting of Elk Mills Loading Corporation?

A. No, sir.

Q. Did you make a report about some tires for Triumph Explosives?

A. I have a vague recollection of having done so. The O. P. A. had issued this tire restriction business and I had received a letter, probably from Mr. Feldman or young Mr. [fol. 85] Kann, or it might have been Mr. Decker, to contact the O. P. A. Rubber Division to see whether or not we could get —

Q. Well, we don't need to go into that. But you remember the incident?

A. I remember an instance of tires; yes.

Q. Did you hear any discussion about bonuses at that time on March 17th?

A. I couldn't say on that particular date; but there has always been a bonus set-up, so far as I can recall.

Q. Did you vote on any bonuses at that meeting of March 17th?

A. I couldn't positively tell you.

Q. You don't remember?

A. No; I don't remember.

Q. Are you positive that you did not hear anything about Elk Mills Loading Corporation?

A. I had never heard of Elk Mills until October first. To this date I have no idea where it is located.

Q. Did you take any action about it on October first?

A. There was quite a lengthy discussion on October [fol. 86] first with reference to Elk Mills; and the meeting dragged through until late in the evening and — decided to defer it until October 7th.

Q. At the meeting on October first did you learn of some other subsidiaries of which you knew nothing?

A. Yes; there were several subsidiaries discussed.

Q. Will you give us the names of those subsidiaries?

A. Sussex, Kent, and Milford, and Delaware Fireworks.

Q. Did you attend the meeting of October 7, 1943?

A. Yes, sir.

Q. Did you take your attorney along, Mr. Townsend?
[fol. 87]: A. Yes, sir.

Q. What action was taken by the Board on October seventh with reference to Elk Mills Loading Corporation?

A. I am inclined to believe that this money that was invested in these plants was to be turned back to Triumph. I think Mr. Kann said that he would be responsible for any holding his nephew had, that he would see that he paid it back. Mr. Decker said that he would see that Deibert and Victor Willis would pay theirs back; and he said he felt quite confident that Mr. Prial would pay his money back to the company, thereby making the Triumph company whole.

Mr. Paisley: You may examine.

Cross-examination.

By Mr. Sobeloff:

Colonel Shirley, you remember the meeting of March 17th that you were telling us about, and you say that you did not hear anything about Elk Mills at that time?

A. Never.

Q. Do you remember what time you left that meeting?

A. No; I couldn't tell you.

Q. Do you remember at what stage you left?

[fol. 88]: A. I couldn't recall whether the meeting was over or not.

Q. Would this refresh your recollection, this resolution that you and Mr. MacBride offered in October? Doesn't that say: "Further, that the minutes be amended by showing that Messrs. Shirley and MacBride left the said meeting of March 17, 1942 before its termination"? Do you remember voting on this resolution?

A. Oh; yes.

Q. Did you offer it?

A. My attorney did.

Q. Your attorney offered it?

A. Yes.

Q. In your presence?

A. Yes, sir. It was suggested by Mr. MacBride, and my attorney completed this copy here.

Q. So Mr. MacBride and your attorney and you offered this thing?

A. Yes.

Q. And it shows that you left before its termination. So evidently when the resolution was offered you were of the impression that you had left before the termination [fol. 89] of the meeting on March 17th?

A. I couldn't say yes or no to that.

Q. You do not want this jury to believe that you stayed there until the end of the meeting and that nothing took place about Elk Mills, do you?

A. I don't get your question. You don't expect me to do what?

Q. Are you suggesting to this jury—

A. No; you are.

Q. No; I am asking you, Colonel. I am not quarreling with you. I am just asking you a question. I am just asking you what it is that you want the jury to understand. There was a meeting on October 17th, and you were present.

The Court: March 17th.

The Witness: March 17th.

By Mr. Sobeloff:

Q. Yes; March 17th.

A. Yes.

Q. And the minutes show that there was a discussion about Elk Mills; but you say that you never heard anything about that?

[fol. 90] A. I never heard anything about it.

Q. The explanation could be that nothing was said about Elk Mills, or it could be that you left before the end of the meeting?

A. Very definitely.

Q. What is your best understanding about that? Which is it?

The Court: Understanding or recollection?

By Mr. Sobeloff:

Q. What is your recollection?

A. I can only recall that I did not hear it. It is very possible indeed that I left before the meeting ended, because I had a drive to Wilmington to get a train back to

Washington, and it was a very difficult trip. That is the reason I have not attended all of these meetings.

Q. And this resolution that you and that your attorney helped prepare says that you left the meeting before its termination, doesn't it?

A. If that is correct, we did.

Q. It says that, doesn't it?

A. Yes.

[fol. 91] Q. That is your resolution?

A. Yes, sir.

Mr. Sobeloff: That is all.

(Witness excused.)

Mr. Paisley: If Your Honor please, we subpoenaed Mr. Diamondstone, but Mr. Sobeloff asked me to stipulate, to save his coming down here from Boston, that his testimony would be the same as Colonel Shirley's and witness MacBride's, to the effect that he also knew nothing of Elk Mills until October first, 1942; and that he is related to Mr. Kann.

In what respect?

Mr. Sobeloff: He is a brother-in-law.

Mr. Paisley: A brother-in-law of Mr. Kann.

Mr. Sobeloff: I would rather stipulate it in this way. I do not want to connect it up with Mr. MacBride and Colonel Shirley. They say that they were present but left before the meeting was over. Mr. Diamondstone was not present at all but he had notice of the meeting, but he was not present.

I will stipulate that he was not present.

Mr. Paisley: As I understand you, you stipulate that he [fols. 92-109] was not present March 17, 1942?

Mr. Sobeloff: That is right.

Mr. Paisley: You will stipulate that he did not know anything about Elk Mills until October 1, 1942?

Mr. Sobeloff: That is true. He did not attend any meetings from March 17th to October first, as I understand it, although he received notices.

[fol. 110] Mr. Paisley: Gentlemen, I might show you this paper. Counsel has stipulated and agreed that the [fol. 111] mail was used, as alleged in the second and third

counts of the indictment of three counts. The Government abandons the first count. That will save a lot of time.

Mr. Sobeloff: I think it would be fair to let the jury know that the first count is the only count that has a check paid out to Mr. Kann.

Mr. Paisley: I know, that is so.

Mr. Sobeloff: I know; but they do not remember it.

Mr. Paisley: Well, that is true.

Mr. Sobeloff: That is abandoned?

Mr. Paisley: That first count is abandoned. The witnesses who were subpoenaed from the bank may be excused.

Mr. Sobeloff: Your Honor, I had an opportunity to look over the prospectus that Mr. MacBride left with me at the close of court, and I would like to know whether Mr. Paisley will consent to my reading it, without recalling him, that is, without recalling Mr. MacBride for cross-examination. I understood that he was to leave the thing with me to go over. I have gone over it, and I find that his recollection is [fol. 112] wrong about Atomite. He said that he had not heard of any formation of that Atomite Company. But I find in his own prospectus a paragraph in which that is discussed. I want to read that to the jury without recalling Mr. McBride, unless you want me to send for him again.

Mr. Paisley: I think the Atomite Company and the Atomite transaction had nothing to do with this case. If counsel wants to read anything about that, it ought to come in in his case and not in ours.

Mr. Sobeloff: I think it is part of the cross-examination. Your Honor will recall that the witness MacBride said that he did not remember the discussion about Elk Mills. To test his recollection, both Mr. Paisley and, I think, the Court and I asked about other transactions that took place at that time. One of the things mentioned in that meeting was a discussion about Atomite and that company, and I asked him whether he knew about that company. He said he did not know that there was such a company.

I want to show that his own prospectus issued for the [fol. 113] sale of Triumph Explosive stocks refers to this Atomite Company that was to be formed and to be owned half by Triumph Explosives and half by the U. S. Powder Corporation.

The Court: The point is made, purely as a matter of procedure, that it ought to be a part of the defendant's

case rather than be read now after the witness has left the stand. It is true that you asked him to leave that with you, but it was simply for your convenience. I think the point made by Mr. Paisley is probably correct.

Mr. Sobeloff: Would Mr. Paisley consent to identifying this as a paper given to me yesterday in his presence by Mr. MacBride?

Mr. Paisley: I do not question that.

Mr. Sobeloff: I will ask the stenographer to mark it.

(The Prospectus above referred to was then marked "Defendants' Exhibit No. 1.")

Mr. Paisley: Well, you say that it is?

Mr. Sobeloff: He handed it to me in your presence.

[fol. 114] Mr. Paisley: All right. You may call your next witness.

The Court: Did you read that stipulation to the jury?

Mr. Paisley: The jury was told the substance of it.

The Court: All right. I think that stipulation ought to be read to them. I do not remember that you told them what was in it.

Mr. Sobeloff: I think he did; but it might be read.

The Court: I think it ought to be read to them.

STIPULATION ON USE OF MAILS

Mr. Paisley: "It is hereby stipulated as follows:

"The check described in the second count of the indictment was cashed by the payee named therein at the Peoples Bank of Elkton, Maryland, and was by said bank deposited in the United States mails to be sent and delivered by the Post Office establishment of the United States on or about July 23, 1942, to the Equitable Trust Company at Wilmington, Delaware. Said check in due course was received [fol. 115] from the United States Mails by said Equitable Trust Company at Wilmington, Delaware.

"The check described in the third count of the indictment was deposited by V. G. Willis, Jr., payee, in a bank account maintained by him, V. G. Willis, Jr., in the Farmers Trust Company of Newark, Delaware, and said bank in the usual course of business caused said check to be cleared by the use of the United States mails, and said check was in fact delivered by the United States mails to the Peoples Bank

of Elkton, Maryland and was paid by said bank on July 9, 1942.

"3. The attached carbon of a letter addressed to the Post Master at Elkton, Maryland, is a true copy of an original letter which was mailed to said Postmaster on or about the date shown on said letter."

[fols. 116-118] This carbon is dated April 13, 1942, addressed to the Postmaster, United States Post Office, Elkton, Maryland.

"Dear Sir:"

And it is signed "Elk Mills Loading Corporation, by W. L. Kann, Jr., Treasurer," and it reads:

"We would appreciate your making a listing for your records of the above named corporation on the letterhead. When any mail comes in for the above named corporation, kindly put this mail in the post office box of Triumph Explosives, Incorporated."

It is signed "Yours very truly, Elk Mills Loading Corporation," and by Mr. Kann, Junior, as treasurer.

[fol. 119] The Court: Now, then, this stipulation has been amended to say, as the Indictment alleges, "That the check in the second count was mailed at Elkton, in the jurisdiction of this Court."

The second paragraph has been amended to say that the check was taken from the mails at Elkton, Maryland, within the jurisdiction of this Court.

Mr. Paisley: The first count is abandoned. It describes the check made out to your client, G. H. Kann, for \$5,000, the same as the \$5,000 check to Mr. Willis, described in the third count of the Indictment, both of them being bonus checks, dated the same date.

The first count is abandoned.

DANIEL H. GARRETT.

[fol. 121] By Mr. Paisley:

Q. What is your name?

A. Daniel H. Garrett.

Q. Where do you live?

A. Elkton, Maryland.

Q. In what business are you engaged?

A. Real estate and insurance business.

Q. Are you acquainted with a tract of land up there in your county known as the Gilpin Tract?

A. Yes. I handled that tract of land.

Q. Are you acquainted with Mr. Joseph Ben Decker, of Elkton?

A. Yes, sir.

Q. And you know that he was connected with the Triumph Explosives, Incorporated?

A. Yes, sir.

Q. Mr. Garrett, I hand you a check of Triumph for \$250 made out to you as agent, for "earnest money, as per agreement this date." The date of the check is December 29, 1941. It is check No. 353. Will you tell the Court and jury what that is, if you know?

[fol. 122] A. Yes, sir. That is the down payment on a purchase of a 55-acre tract of land immediately adjoining the Triumph Explosives property.

Mr. Sobeloff: Your Honor, I am not going to object to these things as to each separate question; but I understand that unless Mr. Kann is connected up in some way it is not evidence against him.

The Court: Yes. Of course, that is true.

Mr. Sobeloff: I do not want to waive that, but I do not want to be interrupting too often.

By Mr. Paisley:

Q. Do you recall the transaction?

A. Yes, sir.

Q. With whom did you deal?

A. Mr. Decker.

Q. Did you deal with any one other than Mr. Decker?

A. I think Mr. Criswell. There were several meetings before we could come to any agreement.

Q. Meetings between whom?

A. Between myself as agent of my principals and Mr. Decker. And I think Mr. Criswell on each occasion was [fol. 123] there.

Q. Did you have any dealings, other than that real estate transaction, with Mr. Sidney M. Feldman?

A. No, sir.

Q. With Mr. W. L. Kann, Jr.?

A. No.

Q. With Mr. John J. Prial?

A. No.

Q. With Mr. Victor G. Willis, Jr.?

A. No.

Q. Mr. Arthur Deibert?

A. No, sir.

Q. Was the agreement to buy that land finally consummated and made over to Triumph?

A. Yes, sir. The deed was made. I don't know to just whom, but I know that there was a deed passed.

Q. I hand you another check, for \$500, dated March 11, 1942, made out to you, Triumph Check No. 9727. Was that tendered to you and used in the transaction?

A. Yes, sir. This was my commission for the purchase of the land.

[fol. 124] The Court: Your what?

The Witness: Commissions. Mr. Decker called me up and said that if I could get this land—For years Mr. Decker had been trying to buy this land.

[fol. 125] Mr. Soleloff: My objection is not to that particular remark, but to the whole line, unless Mr. Paisley offers to connect up Mr. Kann with it. He has not asked about Mr. Gustav Kann. He has asked about everybody else, but not about Mr. Gustav Kann.

Mr. Paisley: I have no objection to asking about Mr. Kann.

By Mr. Paisley:

Q. Did you have any dealings with Mr. Gustav H. Kann?

A. No, sir.

[fol. 126] Mr. Paisley: Did you see that (passing document to Mr. Sobeloff)?

Mr. Sobeloff: No.

By Mr. Paisley:

Q. I hand you a check for \$10,980 drawn by Triumph Explosives, Incorporated, Elkton, Maryland, October 1, 1942, No. 4807, "balance of purchase price for 55.7 acres of land from Gilpin interests." Was that check used in the closing of the transaction?

[fol. 127] The Witness: I can not tell you exactly about that check. It all had gotten out of my hands by the time of the final settlement. The property was owned by two persons, one of whom died, and it very much complicated the title. He was very much involved financially. A lot of notes came into the Orphans Court, and I think these [fol. 128] leinors petitioned the Circuit Court for trustees to be appointed. It took quite a long time to straighten out the title.

By Mr. Paisley:

Q. You had already gotten your commission back in March?

A. Yes.

Q. So you were more or less unconcerned about the final details?

A. It was out of my hands. It was in the Circuit Court of the County, and trustees were appointed by that Court. I believe the Court was petitioned to confirm this sale; and I think they required some time to lapse before the Court would confirm it.

Mr. Paisley: Are you willing to stipulate that the deed was made to Triumph Explosives after the negotiations that he has testified to?

Mr. Sobeloff: Do you have the date of the deed there?

Mr. Paisley: Yes, both of them.

Mr. Sobeloff: Yes, all right. Offer them. I have no objection.

[fol. 129] Mr. Paisley: I just do not want to encumber the record with a lot of detail if you are willing to stipulate.

Mr. Sobeloff: If your Honor please, I do not like Mr. Paisley's manner. I take exception to it: He hands me a paper that I have never seen before, and says, "Will you stipulate this?"

[fol. 130] What is it that you want to do, Mr. Paisley? Are you offering something in evidence or not?

Mr. Paisley: I presented counsel with the deed that was finally executed for the land, deeding the property to Triumph Explosives.

Mr. Sobeloff: I have no objection to that.

The Court: Hand the paper to Mr. Sobeloff.

Mr. Sobeloff: I have no objection to that. It was apparently a deed that was recorded.

The Court: Very well. You are offering it in evidence?

Mr. Paisley: I will offer it if we can not stipulate it.

The Court: That is the simplest way.

[fol. 131] Mr. Sobeloff: What is it that you want me to stipulate about the deed?

Mr. Paisley: That the title to this real estate that the witness is testifying about was placed in Triumph Explosives, Incorporated.

Mr. Sobeloff: I agree to that. Will you give the dates, please? Will you give the date, so that the record will show that?

Mr. Paisley: The deed recites the date of June 18, 1942.

Mr. Sobeloff: What is the date of the record? You will probably find it on the back of the paper.

Mr. Paisley: Recorded October 3, 1942.

Mr. Sobeloff: I stipulate that.

Mr. Paisley: I offer in evidence these three checks. Is there any objection?

Mr. Sobeloff: Before you pass from that deed, do you have a later deed from Triumph to Elk Mills for this property?

Mr. Paisley: Oh, yes!

Mr. Sobeloff: Don't you think it would be orderly to have [fol. 132] that at this time?

Mr. Paisley: I have here a deed from Triumph dated the first day of October, 1942, to Elk Mills, properly executed, apparently, by its officers. It does not appear to have been recorded.

Mr. Sobeloff: And where is this paper from?

Mr. Paisley: From the files of Triumph Explosives, Incorporated, Elkton, Maryland.

The Court: Who are the officers who executed the deed?

Mr. Paisley: R. V. Criswell, Vice-President; attested by Elizabeth Jackson, Assistant Secretary; with the corporate seal, and acknowledged before a Notary Public.

The Court: What is the land to which the witness, Mr. Garrett, has been referring, that is covered by this? What is the land?

Mr. Paisley: It is known as the Gilpin tract, if Your Honor please.

The Court: I am afraid the jury does not know any more about that than I do, as to where it is and what relation it [fol. 133] has to this case, except insofar as we may guess about it from the opening statement. I think it would be helpful to the jury to understand the case as we go along if there were a little explanatory statement as to just what the land is.

Is this the land to which you referred in your opening statement?

Mr. Paisley: Oh, yes; on which certain buildings later were constructed.

The Court: And the witness dropped the remark, or made the remark that it was land adjoining the lands of the Triumph Explosives.

What is the size of the land?

Mr. Paisley: It is described, Your Honor, as all of the tract or parcel of land situated in the County of Cecil, near the town of Elkton, and more particularly bounded and described as follows:—

The Court: Well, not by metes and bounds, but how many acres did it have?

Mr. Paisley: Containing 55.7 acres of land, more or less, being the same land and premises—

[fol. 134] Well, there is no need of that.

The Court: Mr. Garrett is no doubt thoroughly familiar with the land.

Mr. Garrett, please describe to the jury just what the land is and where it lies with respect to the town of Elkton and with respect to the property of Triumph Explosives.

The Witness: It lies partly within and partly without the limits of the town of Elkton. The limits, I think, just about hit one end of it. It is immediately next to land of Triumph.

The fact is that I think some of the Triumph's buildings were on it before it was purchased. But also it is bound by Mr. Decker's home farm and by the road, what we call Singerly Road, running from Elkton to Singerly.

The Court: It may not be important, but doubtless some of the members of the jury are familiar with Elkton. For the purpose of this further answer put yourself at the Court House in Elkton, which is on the main street, on the corner of a road that runs off to the west. Now, how would you get to this property of Triumph and this 55 acres from the [fol. 135] Court House?

The Witness: I would go west on Main Street for two blocks, then I would turn north and go about three or maybe four city blocks, and I would be at this property.

The Court: Is the property what I would call west, or maybe technically or strictly north of the Pennsylvania Railroad?

The Witness: Yes, sir.

The Court: Which is on the other side from the Court House at Elkton?

The Witness: It is across the tracks; yes.

The Court: About how far from the Court House?

The Witness: Well, sir, I would say about a mile.

The Court: About a mile?

The Witness: It is about a mile.

The Court: On this 55 acres were there improvements?

The Witness: No, sir, there was nothing there but some [fol. 136] timber on part of it, and the other part was young growth.

By Mr. Paisley:

Q. Where is the office building of Triumph with respect to Mr. Decker's home?

A. The office building of Triumph is within three or four hundred yards, I guess. That is a pure guess.

Q. Where is this Gilpin tract, with respect to the office building?

A. It is next to the office building. It is within a couple of hundred feet, I guess.

Mr. Paisley: I had offered these three checks that the witness identified. I take it that there is no objection.

Mr. Sobeloff: I assume that it is subject to the same ruling that Your Honor made as to the rest of the testimony.

(The three checks were thereupon marked "Government's Exhibit No. 8.")

Mr. Paisley: As to these three checks admitted as Government's Exhibit No. 8, the first check is for \$250, dated December 29, 1941, and is a Triumph check signed by R. V. Criswell, Second Vice-President, J. B. Decker as secretary and treasurer, marked "Earnest money as per agreement this date."

The Court: Is that a Triumph check?

Mr. Paisley: Yes.

The Court: It was signed by Decker as secretary and treasurer?

Mr. Paisley: That is true. It is marked. That is, the printing "Secretary and Treasurer" is not run through, or anything like that. Apparently he just signed his name without noticing what he was signing.

The second check, for \$500, is dated March 11, 1942, marked "Per agreement", made out to Mr. Garrett, and is a Triumph check signed by R. V. Criswell, Second Vice-President, J. B. Decker, Executive Vice-President.

The third check is dated October 1, 1942, made out to Frank W. Forrestell. It is for \$10,980, and is marked "Balance of purchase price for 55.7 acres of land from Gilpin interests." It is signed by R. V. Criswell, Second Vice-President, G. H. Kann, President.

STEPHEN R. JACKSON

Q. Mr. Jackson, will you please speak out loud enough so that the gentlemen can hear all of your testimony.

A. Yes.

Q. What is your name?

A. Stephen R. Jackson.

Q. Where do you live?

A. Wilmington, Delaware.

[fol. 139] Q. In what business are you engaged?

A. Contractor.

Q. Have you ever had any business transactions with Triumph Explosives at Elkton, Maryland?

A. Yes.

Q. What was the general nature of the business?

A. Construction of the Naval Plant.

Q. Did you have the prime contract for the construction of that plant?

A. A sub-contract.

Q. You had a sub-contract?

A. Yes.

Q. To how much did it amount?

A. That first contract was \$340,000.

Q. What particular type of construction do you do?

A. Buildings, general construction and buildings.

Q. The plant that you are talking about that you had a [fol. 140] sub-contract to construct was that 40-millimeter plant, was it?

A. Yes.

Q. When did you begin the construction of that plant and when did you end it?

Q. When did you begin the construction of your part of [fol. 141] these 40-millimeter shell loading plant?

A. About the first of July, 1941. The first contract was completed around February of 1942.

Q. Did you have any business dealings with Elk Mills Loading Corporation?

A. I constructed the plant and the buildings where they operate; yes.

Q. Were they constructed on what is known as the Gilpin tract of land up there, or do you know?

A. I don't know.

Q. Where was it with respect to Triumph's office building?

A. It was adjoining and east of their office building. [fol. 142] Q. Near by?

A. Yes, sir.

Q. Whom did you deal?

A. I dealt with Mr. Feldman and Mr. Deibert. In other words, they gave me the orders for the buildings that we constructed.

Q. When was that?

A. That was about the last of January, 1942; I would say, or the first of February.

Q. Did you have your first negotiations with them? Just tell us in your own way with whom you dealt, what the proposition was, and what you agreed to do?

A. I gave them a price on certain types of buildings, and they gave me an order to proceed with them.

Q. When you say "they," you mean—

A. I mean Mr. Deibert and Mr. Feldman.

Q. Did you ever enter into an agreement with any one to purchase the timber off of a tract of land to be used in the construction of these buildings?

A. Mr. Deibert told me that he wanted me to use all of the timber—

[fol. 143] Mr. Sobeloff: If your Honor please, I ask that any conversations out of Mr. Kann's presence be not admitted as against him.

The Court: All that depends on whether the jury finds that there was a scheme to defraud and the defendant was a party to it. If the jury does, and if it finds that various people were parties to the scheme and did various things for the purpose of carrying out the scheme, and that Mr. Kann was a party to it, there is a carrying out of the plan with other people, it seems to me.

There is no practical way in which we can try the case except by hearing what the Government's testimony is.

Mr. Sobeloff: I appreciate that. But I want it understood by my silence it is not waived.

The Court: I understand your position is that there was no scheme to defraud so far as Mr. Kann ever knew or participated in.

Mr. Sobeloff: That is right.

The Court: And, therefore, that what other people did which he did not know about is not binding upon him.

[fol. 144] Mr. Sobeloff: That is right.

The Court: That is undoubtedly true as the underlying principle in the whole case.

Mr. Paisley: Go ahead, please.

The Witness: Mr. Deibert told me he wanted me to use any timber we could from the sawmill they had on the ground sawing up the timber.

By Mr. Paisley:

Q. Did you find that there was a sawmill on the ground?

A. Yes.

Q. Was it your sawmill?

A. No.

Q. Do you know how it got there?

A. No.

Q. The first thing you knew about it was they wanted you to saw the timber?

A. No, they wanted me to use the timber.

Q. Who was to saw it?

A. I don't know.

Q. But you were willing to use it, were you?

A. The mill was there at that time.

[fol. 145] Q. You were willing to use the lumber?

A. Yes.

Q. And pay for it?

A. No; I supposed they were furnishing it to me.

The Court: Was there any written contract between you and anybody with regard to this building project?

The Witness: Yes, I gave prices on the different types of buildings per building, not as a lump.

The Court: Is there such a written contract available?

By Mr. Paisley:

Q. With whom did you contract in writing?

A. Mr. Feldman. I had my dealings with Mr. Feldman.

Q. Do you have your copy of the contract?

A. No.

Q. I hand you a paper purporting to be your bill or a bill on your billhead. What is that?

A. That is for the timber that was billed to me that we used in the construction of these buildings.

[fol. 146] Q. What did you do with that?

A. I, in turn, billed Triumph for this amount.

Q. Did Triumph pay you that amount?

A. Yes.

Q. What is this paper that I hand you (indicating)?

The Court: What is that check? Let's take one at a time.

The first is your bill?

The Witness: A bill that I presented to Triumph after they billed me for the lumber which was not included in my bills originally.

The Court: Mr. Jackson, of course we do not understand what you are talking about, because you are alluding to something that we do not know about.

Let me see the paper to which you refer.

The Witness: All right.

The Court: Now, this is a bill which you, Jackson, rendered to the Elk Mills Loading Corporation for barricades in front of No. 8 Shed, barricades in front of mixing house, storage shed, magazine barricade, warehouses, and so on. [fol. 147] Is that for the building of these things? Did you build these things, the barricade, the shed, and the barricade and the storage shed?

The Witness: Yes.

The Court: You built them?

The Witness: Yes.

The Court: On this land that you have described, on the order of Mr. Feldman; is that right?

The Witness: Mr. Feldman, yes, sir, and Mr. Deibert.

The Court: And Mr. Deibert?

The Witness: Yes.

The Court: And then you rendered a bill for your services in so building to the Elk Mills Loading Corporation?

The Witness: In the beginning, your Honor, when I rendered them bills I did not include the lumber that was furnished from this sawmill in my original bills. I received a bill for \$2,000 after I had rendered my first bill for lumber used, which I billed for and had included in my bills to Triumph.

The Court: Counsel may know what the witness is talking about, but the Court does not. I don't know whether the jury understands it or not. It would be better to make it plain, if possible, if it has any significance in the case. And I suppose you would not ask about it unless you thought it had. But the witness has produced a bill on his billhead rendered to the Elk Mills Loading Corporation. I have read an item from it. Its total amount is \$12,062.18.

I asked you whether this is a bill that you rendered for services in building these buildings to the Elk Mills Loading Corporation.

The Witness: No, that is a bill for lumber only from this sawmill.

The Court: Why should you be rendering a bill to the Elk Mills Corporation for lumber used for them taken from their property?

The Witness: Because they billed me and said the lumber did not belong to Elk Mills Loading Company.

The Court: Where is the mill to which you are now referring, where they billed you?

The Witness: I have it in my files.

[Vol. 149] The Court: Do you have it here?

The Witness: No, sir.

The Court: I turn him back to you for the purpose of trying to understand what the witness is saying.

Mr. Paisley: May I have Exhibit No. 1?

The Clerk: Here it is. (Passing document to Mr. Paisley.)

By Mr. Paisley:

Q. Mr. Jackson; will you tell the Court and Jury just what arrangement there was whereby you undertook to purchase the lumber on this Gilpin tract and used in the construction of the buildings?

A. I did not make any arrangements to purchase the lumber. When I rendered my bill I put on my bill "so much lumber used" and "no charge."

Q. In fact, was the timber on this tract cut and used by you in the construction of the buildings?

A. That is right.

Q. Did you pay any one for the lumber?

A. I did, yes, after they had billed me.

Q. Who is "they," when you say they billed you?

[Vol. 150] A. The check is made out payable and charged from Feldman, Kann and Deibert.

By Mr. Sobeloff:

Q. Which Kann?

A. William Kann, Jr., Deibert, Prial and Willis.

By Mr. Paisley:

Q. Do I understand that you received an invoice from these individuals for this timber?

A. That is right; yes, sir.

Q. Did you pay them for it?

A. I paid them after they paid me, yes—by check.

Q. Who paid you?

A. Triumph Explosives.

Q. What is this check that I now hand you?

A. This is a check in payment for the lumber for this lumber that was billed to Triumph Explosives.

Q. Is that the check that you received? What is this check that I hand you?

A. That check came in, and it claimed to be the owners of the timber that we used.

Q. Is that your check that you used to pay for the lumber that you used in the construction of the buildings?

A. That is right.

[fol. 151] Mr. Paisley: I would like to offer this in evidence.

Mr. Sobeloff: Subject to the reservation, I have no objection.

[fol. 152] Mr. Paisley: Has this check been given an exhibit number?

The Clerk: Yes, Exhibit 7 for Identification. I will leave it with the same number and scratch out the identification.

(Check referred marked and filed in evidence as Govern-
[fol. 153] ment Exhibit 7.

Mr. Paisley: Gentlemen, I have in my hand here in evidence a check that this witness, Jackson, says he paid for the timber that he used for the building on the tract of land.

(Check read to the jury by Mr. Paisley).

Mr. Sobeloff: Mr. Baisley, will you be good enough to state whether that Kann is the defendant or William L. Kann, Jr.?

Mr. Paisley: I had just gotten to that. It is not endorsed by your client.

Mr. Sobeloff: Thank you. That is what I want.

Q. At the time you issued that check, Mr. Jackson, had you already used the lumber?

A. Yes, sir.

Q. Had you been paid for your construction work?

A. Yes, sir.

Q. By whom?

A. By Triumph Explosives.

Q. On the date that you issued this check which has just been shown to the jury did Triumph owe you any money?

[fol. 154] A. They paid me—on the day that check was issued they paid me for the lumber, and I, in turn, paid them, paid those different ones on this check. I was instructed that the material belonged to those names that are on this check.

Q. Who told you the lumber belonged to the payees on that check?

A. William Kann, Jr.

The Court: Who?

The Witness: William Kann, Jr.

By Mr. Paisley:

Q. Of course, that timber was part of your construction cost, wasn't it?

A. No, sir.

Q. Why wasn't it?

A. Because my understanding was that they were furnishing the material and I did not bill them for it until they rendered me a bill for the lumber.

The Court: Mr. Jackson, when you say "they", we don't know who you are referring to. That often often happens when people are using pronouns instead of nouns. "They," [fol. 155] might possibly refer to Triumph, to the officers of Triumph, to the Elk Mills, or to the officers of the Elk Mills or to these individuals. So that when you use a pronoun, "they," or "them", we don't know who you are referring to. I suggest that you use the names of people by class with reference to who they are rather than using the pronoun, "they."

The Witness: I will use Elk Mills Loading Company.

The Court: I don't know just how you are using it. Go ahead.

The Witness: That is, Elk Mills Loading Company owned the lumber.

By Mr. Paisley:

Q. Who told you that?

A. No one told me that, but that is who I was building the buildings for, and they instructed me to use as much

as I could in the construction of the buildings, and we gave Mr. Deibert a list of what materials we could use, which was not all. We had to buy some from outside dealers. And when I rendered my bills, I did not include the lumber [fol. 456] that Elk Mills furnished me in my bills. Then after I received a bill—the first bill I received, was for \$2,000 and and I went to William Kann, Jr.,—

The Court: You say the first bill you received was for \$2,000. A bill from whom for \$2,000 and for what?

The Witness: From the Elk Mills Loading.

The Court: All right. And what was it for?

The Witness: It was for lumber furnished, we will say, by Elk Mills Loading.

The Court: All right. The Elk Mills rendered you a bill first of \$2,000.

The Witness: Yes.

The Court: What relation has that to \$12,000? Was it a part of the \$12,000?

The Witness: That was a partial bill.

The Court: All right. Just a bill on account.

The Witness: Yes, sir.

The Court: All right. Go ahead.

By Mr. Paisley:

Q. Were you to furnish materials that were to go into these buildings, or was some one else to furnish them?

[fol. 157] A. When I gave them the price on the buildings, per building, I figured on using material that I would furnish, would buy from lumber dealers.

Q. Did you conclude to buy this lumber that was out from the Gilpin tract to be used in the construction, too?

A. No, we did not figure on it when we started off.

Q. Sir?

A. We did not figure on the materials from the Gilpin tract in the beginning; no.

Q. Well, at any time did you figure on it?

A. No.

Q. Was lumber to be furnished you from this tract?

A. Not in the beginning. That is, I did not know of it in the beginning.

Q. Without any cost to you or were you to buy it and pay for it?

A. I was to buy it.

Q. And pay for it?

A. Yes. Not from Elk Mills Loading. It was not stipulated at the time. I figured the first buildings I was to buy it from Elk Mills Loading Company or any one.

[fol. 158] Q. And you did pay for it by this check?

A. That is right, after it was all finished.

Q. How did you happen to get this check which I now hand you, if you did get it?

A. I did get it.

Q. Explain it to the jury, if you can explain it.

A. I received a bill for the amount of lumber, which is \$12,062.18, and, in turn, I billed Triumph for this amount and they paid me. That is, Triumph paid me.

Q. Is that the check that was used?

A. That is the check, according to the amount of the bill.

Mr. Paisley: I would like to offer this.

Mr. Sobeloff: I have no objection.

(Check referred to marked and filed in evidence as Government Exhibit 8).

Mr. Paisley: This Triumph check is in the same amount, exactly \$12,062.18, as Government Exhibit No. 7. Jackson's check to Deibert, Feldman, Kann, Prial and Willis, dated July 21, 1942, his check to Deibert, Feldmann, Kann, Prial and Willis, July 22, 1942. The check is made out to [fol. 159] Stephen R. Jackson & Company, signed on behalf of Triumph Fusee and Fire Works Division, by Criswell and G. H. Kann, and endorsed by Mr. Jackson.

(Check referred to marked and filed in evidence as Government Exhibit 9.)

Q. You were not out of pocket anything on the deal, were you?

A. No, sir.

Q. Do you have the bill with you received for the timber?

A. Do I have the bill, did you say?

Q. Yes.

A. We have it in our files in Wilmington.

Q. You did not bring it to court with you?

A. No, sir.

Q. You can get it if it becomes material?

A. Yes, sir.

Q. Who rendered you that bill?

A. Our dealings were with William L. Kann, Jr., on the lumber. I imagine that is who the bill came from.

Q. Is that, Mr. W. L. Kann, Jr., standing up back here?
[fol. 160] A. That is right.

Q. Was the bill an Elk Mills Loading Corporation bill?

A. I couldn't say whether it was Elk Mills Loading.

Q. Well, why did you make the check out to the individuals?

A. I was instructed to by William L. Kann. He said these different individuals owned the timber.

Q. Did you bill through the mail or was it handed to you personally?

A. It was handed to me personally by Mr. William L. Kann, Jr.

Q. And he told you to make the check out to the individuals?

A. That is right. He said they owned the timber.

Mr. Paisley: You may cross-examine the witness.

Cross-examination.

By Mr. Sobeloff:

Q. Did you ever discuss any part of this or have any transactions concerning this lumber with Mr. Gustav Kann?

A. Mr. William Kann did in my presence.

Q. But I am asking you about Mr. Gustav Kann, the [fol. 161] gentleman seated here.

A. Mr. William Kann discussed it with him. William Kann, Junior, discussed it with Mr. Gustav Kann in my presence.

Q. What did he discuss in your presence?

A. Just asked him if it was all right to pay the bill.

Q. When was this?

A. July, first part of July, possibly July 2nd. Whatever date the check was paid to me.

Q. Let me understand it. You were present when Gustav Kann discussed this with William Kann?

A. That is right.

Q. What was said by him?

A. He just asked Mr. Gustav Kann if it was all right to pay this bill, and he said he didn't see why not.

Q. Well, did he explain to him what it was?

A. I don't know.

Q. What?

A. He may have—not in my presence. I don't know what was explained to him before.

Q. All you heard was, "Is it all right to pay this bill?"

[fol. 162] A. Yes.

Q. Was that the only bill that was being paid to you?

A. That is right.

Q. Were you also paid for constructing these buildings?

A. Yes, sir.

Q. That was also paid by a Triumph check?

A. That is right.

Q. Will you tell me, please, when this took place, this discussion, and where?

A. The day the Triumph paid me for the lumber, in the Triumph offices.

Q. The day the Triumph paid you for the lumber?

A. Yes, sir; that is right.

Q. In whose office was it?

A. In the Triumph Explosives office.

Q. Which part of it? That is quite a large place?

A. It was in Mr. William Kann's office that was in the old part of the building, the original part.

Q. Who was present?

A. At that time I was with Mr. William Kann, Jr.

[fol. 163] Q. Yes.

A. Just he and I and Mr. Gustav Kann.

Q. Had the check been drawn?

A. No.

Q. Well, did you present any bill to Mr. Gustav Kann?

A. No, I presented it to the Triumph Explosives, gave it to Mr. William Kann.

Q. You gave it to Mr. William Kann?

A. Yes.

Q. Did he have the bill there in his hand when he was talking to Mr. Gustav Kann?

A. I couldn't say that he had the bill in his hand.

Q. He did not?

A. I can't say that he did. He may have.

Q. Was there any explanation, or further explanation, of this transaction?

A. No. Nothing other than Mr. William Kann told me to make the check out to these individuals.

Q. Was Mr. Gustav Kann present when William Kann told you to make out the check to these individuals?

A. No, he was not.

[fol. 164] Q. What exactly did take place in Gustav Kann's presence?

A. Just simply Mr. William Kann asked Mr. Gustav Kann if it was all right to pay this bill.

Q. What bill did he identify, what bill?

A. The bill I presented to Triumph for this lumber.

Q. But you say he did not have the bill there. Did he explain what bill it was that he was asking permission to pay?

A. He said the lumber bill.

Q. Did he say what it was?

A. No, he didn't say it in my presence.

Q. Was there anything said about your reimbursing William Kann and these other four men?

A. In Mr. Gustav Kann's presence?

Q. Yes.

A. No.

Q. Nothing of that sort was said in Mr. Gustav Kann's presence?

A. No, sir.

Q. How much were you paid by Triumph for the construction of the buildings?

[fol. 165] A. Do you mean the entire plant?

Q. Yes.

A. Somewheres around \$111,000.

Q. And was that paid—

A. That is close to it.

Q. \$111,000 was paid in one sum or paid in instalments?

A. In instalments as we rendered bills.

Q. Did those bills include lumber purchased on the outside?

A. Yes, sir.

Q. And, of course, Mr. Gustav Kann knew that you were the contractor for the construction of those buildings?

A. Oh, yes.

Q. And he knew that that account, although for Elk Mills, was being handled and paid through Triumph and later charged by Triumph to Elk Mills?

A. I suppose he knew that. Of course, I didn't know that. I don't know how it was being charged.

Mr. Sobeloff: I would like to ask Mr. Paisley whether it is or is not his position that the money paid by Triumph [fol. 166] for the construction of the buildings for Elk Mills was reimbursed to Triumph by Elk Mills. I understand that it was. Is that disputed?

Mr. Paisley: Well, it is all just a matter of bookkeeping.

Mr. Sobeloff: What?

Mr. Paisley: What is your question?

Mr. Sobeloff: There has been some testimony here that the building or buildings constructed by Mr. Jackson for Elk Mills being paid for by checks of Triumph. I want to know whether you admit, as we contend is that fact, that those amounts advanced by Triumph to Mr. Jackson for construction work done by Elk Mills was reimbursed to Triumph by Elk Mills.

The Court: What do you mean by reimbursed, paid back?

Mr. Sobeloff: Paid back. In other words, Triumph was handling the bookkeeping on the transaction, but Triumph was paid back by Elk Mills all that it advanced for that purpose.

Mr. Paisley: It is a fact that the Government, in connection with this incendiary bomb contract, advanced money to Triumph. I think around \$400,000 from time to time. \$200,000 was the limit they could use in buildings. Triumph advanced money probably in the construction of the buildings and charged it up to Elk Mills, and according to the Minutes, which are all here, it was the purpose of Elk Mills to use the money for the construction of the buildings. For any money advanced by Triumph, naturally it paid it back.

Mr. Sobeloff: You say, naturally what?

Mr. Paisley: What is that?

Mr. Sobeloff: I did not hear the rest of your sentence, your voice fell off.

Mr. Paisley: Triumph was to get the money from the Government on the advance money carrying out this contract, they created this corporation, Elk Mills. Triumph was to advance money to that corporation for the construction of buildings for the purpose of carrying on the contract. Under the agreement the Elk Mills was to pay back to Triumph.

Mr. Sobeloff: Do you admit that it did pay back to [fol. 168] Triumph?

Mr. Paisley: I don't want to admit anything.

Mr. Sobeloff: I would like to know whether you are charging us with siphoning out from Triumph the cost of constructing these buildings for Elk Mills. I want to know whether I have to defend that or not.

Mr. Paisley: I think we had better proceed in an orderly way, your Honor.

The Court: Mr. Paisley isn't obliged to answer your questions, Mr. Sobeloff. Is there any further examination of this witness?

Mr. Paisley: I would like to ask him a couple questions in redirect.

Redirect-examination.

By Mr. Paisley:

Q. When did you start constructing these buildings for Elk Mills?

A. The latter part of January, 1942, or first of February, around that date.

Q. When did you complete the work?

A. Around the first of June we completed most of it. [fols. 169-170] There were other buildings built some time after that.

Q. But most of the work was completed in June?

A. I will say around June; most of it. That may be off a few days or a couple of weeks.

Q. What is this paper I hand you?

A. Bill for the lumber, billed to me from Elk Mills Loading.

Q. Isn't that, as a matter of fact, your invoice to Elk Mills on an amount of money exactly the same amount of money called for in these two checks that are in evidence?

A. That is right.

Q. Well, that is your bill, then, that you say W. L. Kann, Jr., got Mr. Gustav Kann to approve, is that right?

A. That is right.

Mr. Paisley: I would like to offer that.

Mr. Sobeloff: He testified that there was no bill present at the time.

[fol. 171] Mr. Paisley: I would like to offer this in evidence and explain to the jury what it is.

(Paper referred to marked and filed in evidence as Government Exhibit 10):

Recross-examination.

By Mr. Sobeloff:

Q. Mr. Jackson, I asked you a while ago whether at the time that Mr. William L. Kann, Jr., was talking to Mr. Gustav Kann the bill that you had rendered was there and you said, No, the bill wasn't there.

A. I mean—

[fol. 172] By Mr. Sobeloff:

Q. Mr. Jackson, I want you to help to clear this up. I asked you a while ago whether or not Mr. William L. Kann, Jr., had the bill that you had rendered him for the lumber at the time that he and Mr. Gustav Kann were talking?

A. He did not have the bill, no. He just referred to it as the lumber account.

Q. I notice that this check is not signed by Mr. Kann. I want the other check which was to the five men, I notice, Mr. Jackson, that this check made out to Stephen R. Jackson & Company by Triumph for \$12,062.18, is not signed by Mr. Kann?

[fol. 173] A. No.

Q. Did you get the check on the same day that you rendered the bill?

A. I wouldn't say that we did. I am not sure about the same date we rendered the bill.

Q. Well, was it before you rendered the bill?

A. It was after we rendered the bill.

Q. Can you explain this? I notice that the check to you, that the twelve thousand and some dollars check is dated July 21 and your bill is dated July 22, the day after the date of the check.

A. I can't explain that.

The Court: When you say "your bill", I am not sure what you are referring to.

Mr. Sobeloff: This paper that Mr. Paisley is offering.

The Court: That isn't his bill. That is a bill to him.

Mr. Sobeloff: Oh, no, your Honor.

The Court: Then I have been given the wrong carbon copy of it.

[fol. 174] Mr. Sobeloff: Here it is, your Honor. It is on the stationery of Stephen R. Jackson & Company.

The Court: You mean he is rendering a bill to the Elk Mills Loading Company?

Mr. Sobeloff: That is right.

The Court: All right.

By Mr. Sobeloff:

Q. Now, you say your recollection is that you first rendered your bill before you were paid, and I call your attention to the fact that your bill is dated July 22nd, the day after the date of the check. Can you explain that in any way?

A. I can not, no. I don't know how the girl would make out the check before I rendered the bill.

The Court: What is the check? I am not seeing it and I am not hearing it.

Mr. Sobeloff: As I said before, it is dated July 21—

The Court: I know, but I don't know what it is.

Mr. Sobeloff: It is a check to Stephen R. Jackson & Company from the Triumph Explosives Company.

[fol. 175] The Court: That check is not responsive to this bill, then, is it?

Mr. Sobeloff: It is for the exact amount.

The Court: That may be true, but the bill, as you have very clearly pointed out, is a bill to the Elk Mills Loading Corporation. The check, as I understand, is a check from Triumph to Jackson.

Mr. Sobeloff: True.

Q. Did you render more than one bill for \$12,062.18?

A. No, I did not.

Q. You rendered one bill and this is it?

A. That is right.

Q. And it was made to the Elk Mills Loading Corporation?

A. That is right.

Q. And you got one check but it was not from Elk Mills, it was from Triumph?

A. That is right.

Q. I call your attention to the fact that the check which you got from Triumph for the twelve thousand and some dollars is dated July 21, 1942, whereas this bill that you rendered Elk Mills is dated July 22nd?

[fol. 176] A. That is right.

Q. Now, I am asking you, under those circumstances, since your bill was not made out until July 22nd, is it possible that you had that bill or that William L. Kann had that bill when he was discussing the matter with Gustav Kann on the date of the check, on the 21st?

A. I can't explain it because it has Received payment on the 22nd.

Q. Yes, exactly. I notice from your recollection you say that William L. Kann, Jr., asked Mr. Gustav Kann about paying the bill and the bill was paid, the check was drawn on July 21st. Later you said that you thought that he approved this bill. Now, the bill was not made out until the next day, so it could not have been the bill, the bill could not have been there, could it?

A. No, the bill could not have been there.

[fol. 177] Q. Did you ever have any other dealings with Gustav Kann about lumber?

A. No, sir.

Q. Did he have anything to do with the construction at all?

A. Of this plant?

Q. Yes.

A. No, sir.

Q. I mean so far as you were concerned?

A. No, sir.

Q. Did you ever have any other conversation with him at any time or at any place about how to render bills or what bills to render or to whom to render bills?

A. I did not, no.

[fol. 178] Redirect examination.

By Mr. Paisley:

Q. Mr. Jackson, would you mind telling us where that bill was actually typed?

The Court: You say by this bill, you had better hand him the paper itself and let him look at it, so there will be no question as to what you are talking about.

Q. I hand you Government Exhibit 10, purporting to be your bill to Elk Mills Loading Corporation, dated July 22, 1942, receipted and paid by you July 22, 1942. Who typed that bill?

A. I understand that my bookkeeper typed it in my office in Wilmington.

Q. Are you sure?

A. I am not positive, but I am reasonably sure.

Q. Did your bookkeeper give it to you?

A. Yes.

Q. Did you mail it or take it down?

A. No. I delivered all my bills in person.

Q. To whom did you deliver this bill?

[fol. 179] A. I could not say whether—I could not say just who I delivered it to. I would say that I delivered it to William Kann, Jr.

Q. Do you remember the time you were in the office talking to William Kann, Jr.?

A. No, I do not.

Q. Do you remember how long Mr. G. H. Kann was in the office with you two men?

A. He wasn't in the office with us two. We were in the corridor.

Q. Corridor of what, the Administration Building of Triumph?

A. Yes. The main office building of Triumph.

Q. How long did your conversation last?

A. Possibly a few seconds.

Q. What was said? Tell this jury what was said and who said it.

A. William Kann told Mr. Gustav Kann—asked Mr. Gustav Kann if he didn't think it was all right—or if it was all right to pay this lumber bill.

Q. What lumber bill?

[fol. 180] A. This lumber bill here.

Q. And what did Mr. Kann say?

A. He didn't see any reason why it should not be paid.

Q. Then what happened?

A. I was paid, given a check for the lumber.

Q. Who gave you the check?

A. Mr. William Kann, Jr.

Q. How soon after this conversation between him and his uncle?

A. Possibly an hour or half hour.

Q. You stayed around to get your money?

A. Yes, sir, and I, in turn, made out this check to the individuals.

Q. Now, about the date, the discrepancy in the date, you say you can not explain it?

A. I can not, no.

Q. Did it ever occur to you that somebody may have made a mistake in typing it?

A. I don't know. I can't explain that.

Q. That is one possible explanation, isn't it?

A. That is possible, but I can't say it happened.

[fol. 181] Recross-examination.

By Mr. Sobeloff:

Q. Another possible explanation is that you are mistaken in your recollection as to how the thing happened, is it not? You would not want to swear it happened just as you have told us?

A. What do you mean?

Q. You told us first during the conversation between Mr. Gustav Kann and Mr. William L. Kann, Jr., there was no bill present?

A. There was no bill present as the lumber account.

Q. But there was a bill present?

A. I would not say there was a bill present, no.

Q. And later I thought you said he asked him, Is it all right to pay this lumber bill?

A. That is right.

Q. At some time in your testimony you talked about whether it was all right to pay this bill. Did he use the word "lumber?"

A. Lumber account.

Q. Are you sure he used the word "lumber", or are [fol. 182] you telling us that the bill or account referred to was about lumber?

A. Naturally it was about lumber; yes.

Q. You assumed it was lumber?

A. No, I didn't assume it was lumber. That is what we were discussing.

Q. That is what you and Billy were discussing?

A. Certainly, the lumber account.

Q. But are you willing to swear that when William L. Kann, Jr., in the corridor in this conversation of a few seconds spoken to his uncle, he said specifically the word, "lumber?"

A. Lumber account.

Q. Are you willing to swear he said "lumber," or are you merely certain, as you said before, naturally what we were talking about was lumber, the lumber account?

A. I am willing to swear that he said lumber, account.

Q. You are willing to swear that he said lumber account?

A. I am.

Q. Why are you so positive about that one word, "lumber," when you are so vague about the time and even about the date and the duration of the whole conversations and all of these things Mr. Paisley asked you about. You said you were vague about the time and the date, and so on, and yet you say you are willing to swear now it was designated as the lumber account?

A. I remember it, that is all.

Q. You know you were talking with William L. Kann, Jr., about the lumber bill?

A. That is right, about the lumber account.

Q. And you naturally assumed that what he said to his uncle in this brief, hurried conversation in the corridor, also referred to the lumber bill?

A. That is right.

Q. You say it lasted a few seconds. Was Mr. Kann going from one office to another in the corridor? How did [fol. 184] they happen to be discussing this thing in your presence in the corridor? Tell us how that came about.

A. Just simply Mr. Kann was in the corridor and when

we came out of William Kann's office he went up to him and asked him; spoke to him.

Q. Who came out of Mr. William Kann's office?

A. Mr. William Kann and myself.

Q. You came out of Mr. William Kann's office with Mr. William Kann?

A. That is right.

Q. And you met Mr. Gus Kann?

A. That is right.

Q. And he asked him one question?

A. That is right.

Q. And he said, Yes. There was no other discussion?

A. No other discussion.

Q. No other explanation?

A. No explanation.

Q. And he continued on his way?

A. That is right.

[Tols. 185] Q. You say Mr. Kann's reply was what?

A. He didn't see why it should not be paid.

Q. "He didn't see why it should not be paid"?

A. That is right.

Q. And that is all?

A. That is right.

Q. No more explanation at all?

A. No more explanation at all.

Q. "I don't see why it should not be paid."

[Tols. 186-187] Mr. Sobeloff: I want to know whether he ever stated to Mr. Paisley, or to the Government, or to any one else before today that he heard this conversation in the corridor that he has testified to here.

The Court: Well, you can ask him that.

Mr. Sobeloff: I notice Mr. Paisley did not ask him that.

The Court: You asked him that on cross-examination, and his statement was made in response to your questions on cross-examination.

Mr. Sobeloff: Yes, sir. That is right. I want to know whether he ever made such a statement before to the Government.

The Court: You can ask him that, if you want to.

A. I don't know whether I did or not.

[fol. 188] The Court: As I understand the matter, the testimony this morning relates to this. Back in the summer of 1941 Mr. Garrett, as a real estate broker, began to negotiate with the Triumph Explosives Company, by whom he was retained as a broker, for the purchase of 55 acres of land adjoining the then property of the Triumph Explosives Company near Elkton, and that as the result of negotiations running over a period of several months, delayed, apparently, by the necessity of clearing title of the vendor's property, the property was finally sold to the Triumph Explosives Company and a deed was given by the vendors, the then owners of the property, to Triumph on [fol. 189] June 18, 1942, and that deed was recorded on the Land records on October 3, 1942. And then under date of October 1, 1942, there was a deed executed from Triumph to the Elk Mills, which, however, was never recorded.

Now, beginning in January, 1942, the Elk Mills Corporation, which had not yet received any deed for the property, acting by Mr. Feldman and Mr. Deibert, made an agreement with Mr. Jackson, the witness in the chair, to build certain buildings on the land that has been referred to. At that time the Elk Mills had no title to the land, had paid nothing for or on account of the land, and so far as the testimony is concerned, had no contract to purchase the land. But in that state of the title, Feldman and Deibert agreed with Mr. Jackson, the builder, to build buildings on the land according to an estimate of the cost. The estimate made by Jackson included his furnishing all the lumber necessary for the building.

The buildings were actually built during the period, January to June, 1942. Mr. Jackson was paid for them, according to his recollection, in a sum approximating \$111,000. The money was all paid to Jackson by Triumph, [fol. 190] and, as I understand it, charged on the books to Elk Mills. When the work was completed—or, rather, before it was completed, Mr. Jackson was told by somebody, or requested by somebody to use timber standing on this 55 acre tract to the extent that he could, instead of buying lumber in the market, and Mr. Jackson did so.

After the work of building the buildings had been completed, Mr. Jackson received a bill for such of the timber as had been cut by him from the tract of land and used in

the construction of the buildings: The bill he so received was, first, a bill for about \$2,000. Subsequently he received other bills in other amounts. Just who rendered these bills, I think does not appear. But finally a consolidated bill was rendered to him in the amount of \$12,062.18. Did you pay that, bill, Mr. Jackson?

The Witness: Yes, sir. I paid it to those five individuals.

The Court: You paid it to the five individuals.

The Witness: Yes, sir.

The Court: That payment was made by check dated July 22, 1942, signed by Stephen R. Jackson, payable to the [fol. 191] order of Messrs. Deibert, Feldman, Kann, meaning William L. Kann, Jr., Prial and Willis, \$12,062.18. When Mr. Jackson found that he had to pay the bill for the timber which had been used in that way, which he had not included in the whole contract price——

The Witness: That is right, your Honor.

The Court: He then rendered the bill, or made a demand on the Triumph that he should be reimbursed for the payment that he had to make, and he received a check from Triumph dated July 21, 1942, in the exact amount of \$12,062.18, and that reimbursed him for the check of similar amount which he had paid to these individuals.

Now, attention has been called by counsel to a variance in the date of payment to Jackson by the Triumph. Triumph's check for this \$12,062.18 is dated July 21, 1942. Jackson's check to the individuals, Deibert, Feldman, and so on, is dated July 22, 1942. The bill rendered by Jackson to Elk Mills Loading Corporation for timber in the amount of \$12,062.18 is dated July 22, 1942. You, apparently, then, Mr. Jackson, did not pay the individuals the \$12,000 until after you had received the check of the Triumph for [fol. 192] the \$12,000.

The Witness: No, sir; I had not.

The Court: Now, then, when was the bill or payment that you referred to in your conversation that you related between yourself, Mr. W. L. Kann and Mr. G. H. Kann?

A. The twelve thousand and some dollars lumber account.

The Court: Which was to be paid by you or to you?

The Witness: To be paid to me.

The Court: By the Triumph?

The Witness: Yes, sir.

The Court: Now, gentlemen, does that summarize the situation correctly?

Mr. Sobeloff: I think it does, your Honor. There is one thing. Your Honor said the testimony showed the deed was given on June 19th. I think the fact is that it was dated June 19th.

The Court: June 18th.

Mr. Sobeloff: June 18th, but it was not given until October, because the proceedings were not completed in court until the fall.

[fol. 193] The Court: Is there any comment otherwise on my summary?

Mr. Paisley: No, your Honor. I think that is very complete.

The Court: Very well. Then let us go on. First, I will give the jury a five-minute recess.

(After a Short Recess.)

Recross-examination.

By Mr. Sobeloff:

[fol. 194] Q. Was there anything said in this short corridor conversation, when you say there was talk about the lumber bill, that that was lumber that you were paying these five men for and not lumber that you bought from dealers on the outside?

A. There was nothing said, only what I told you.

Q. No explanation that this lumber bill had anything irregular about it, or that you were paying these men?

A. Just the lumber account, that is all that was said.

The Court: Is that all?

Mr. Sobeloff: Yes. Now, I want to ask him the question I started to ask him before, if your Honor will permit it. I asked him whether he had ever made the statement before about it.

The Court: He said he did not remember.

Mr. Sobeloff: I would like to examine him a little further on that.

The Court: Do you want to ask him why he does not remember?

Mr. Sobeloff: Yes. I want to ask him how many times he has been investigated by representatives of the Government, how many times he talked about it.

The Court: All right. Go ahead.

By Mr. Sobeloff:

Q. How many times have you been interviewed by representatives of the Government about this transaction?

A. Either two or three times; not altogether this transaction.

Q. By whom?

A. By the Department of Justice.

Q. Do you remember the names of the persons?

A. I do not.

Q. Did you sign any papers, any statements?

A. I don't remember signing any papers; no.

Q. Do you remember to whom you talked? Do you recall the name of the person?

A. No, I can not.

Q. Do you know whether you did or did not sign a statement?

A. No.

Q. Don't you even remember that?

A. I am reasonably sure I didn't sign any statements.

[fol. 196] Q. Was your statement taken down in writing?

A. Yes.

Q. Where was this statement given?

A. In the Triumph Explosives office, main office building.

Q. Who was it took your statement?

A. One of the Department of Justice men.

Q. You don't remember who?

A. I don't remember his name.

Q. Is he here in court?

A. He is.

Q. Is it this gentleman seated next to Mr. Parsley?

A. That is right.

Mr. Sobeloff: What is your name, sir?

Mr. Oldham: Oldham, O-l-d-h-a-m.

Mr. Sobeloff: Give us your full name, please.

Mr. Oldham: David W. Oldham.

By Mr. Sobeloff:

Q. Any one else you gave a statement that was written down?

A. There were two in Mr. Oldham's office at the time, [fol. 197] two Department of Justice men.

Q. You mean two other statements, or two other people were present?

A. Two other people were present one time, and then one time there was only one person present.

Q. Did you make any statement except in the presence of Mr. Oldham?

A. No.

Mr. Sobeloff: Well, now, do you have his statement, Mr. Oldham?

Mr. Paisley: Your Honor—

The Court: Do you object?

Mr. Paisley: Yes, your Honor.

The Court: I sustain the objection to that form of question.

Mr. Sobeloff: Your Honor, I would like to be able to cross-examine him with reference to this paper.

[fol. 198] By Mr. Sobeloff:

Q. Does this statement include everything that you knew about the case?

A. I don't remember what the statement was.

Q. How long did you talk to them on these occasions?

A. Possibly an hour each time.

Mr. Sobeloff: I would like to have an opportunity to inspect that record. Maybe we can recall the witness later.

The Court: At the proper time, when you make a proper call for it, I will pass on it, but this isn't the time for that.

Mr. Sobeloff: I don't ask that the Court stop while I examine this, when I inspect this, but I would like to make demand on them to produce the paper.

The Court: Very well. The demand has been made in open court.

[fol. 199]

REDIRECT

Q. Do you remember whether or not you told Mr. Oldham about Mr. Kann, G. H. Kann, approving the payment for the lumber?

A. I don't remember. I remember the lumber situation was discussed, but I don't remember just what I told him.

Q. Did you ever talk to me at all before I put you on the witness stand?

A. I did not.

Q. You have been interviewed by Mr. Oldham?

A. Yes, sir.

[fol. 200] Mr. Paisley: Reading, gentlemen, from the by-laws of Triumph Explosives on page 6, section 6:

"Section 6. Notice of meetings. Notice of the place, day and hour of every special meeting, shall be given to each director at least two days before the meeting, by delivering the same to him personally, or by sending the same to him by telegraph, or by leaving the same at his residence or usual place of business, or in the alternative, by mailing [fol. 200a] such notice, postage prepaid, at least three days prior to the meeting, addressed to him at his last known post office address, according to the records of the corporation. Notice of every special meeting shall state the business proposed to be transacted thereat; and no business shall be transacted at such meeting except that specially named in such notice. It shall not be requisite to the validity of any meeting of the board of directors that notice thereof shall have been given to any director who is present thereat, or if absent waives notice thereof in writing filed with the records of the meeting either before or after the holding thereof. No notice of any adjourned meeting of the board of directors need be given."

Now, as to a quorum, Section 7:

"Section 7. Quorum. A majority of the board of directors in office shall constitute a quorum for the transaction of business at any meeting of the board of directors; but if at any meeting there be less than a quorum present, a majority of those present may adjourn the meeting from time to time, but not for a period exceeding five days at any one time, without notice other than by announcement at the [fol. 200b] meeting until a quorum shall attend. At any such adjourned meeting at which a quorum shall be present, any business may be transacted which might have been transacted at the original session of the meeting if a quorum had been present."

Now, the minutes—

Mr. Sobeloff: Before you pass from that, are you making the point that there was no quorum? There were four present.

Mr. Paisley: On one occasion there was no quorum after those directors say they left after discussing these matters. Now, I am pointing that out to the jury. I have now before me the minutes of a special meeting of the board of directors of December 11, 1941. Present, G. H. Kann, J. B. Decker, W. L. Kann and R. V. Criswell. That was read to you and you will remember that when this matter was first broached by the Elk Mills, the notice of that meeting is dated December 8, 1941. It says:

"A special meeting of the board of directors of Triumph Explosives, Inc., will be held in the offices of the company near Elkton, Maryland, on Thursday, December 11, 1941, [fol. 200c] at 11 o'clock a. m., Eastern Standard Time.

"The purpose of the meeting is to consider the offer on the part of Messrs. G. H. Kann, W. L. Kann, and J. B. Decker, whereby each will exercise options for 2000 shares of the company's common stock and the amount of \$6,000 to be charged to each of the respective accounts, which accounts presently have credit balance sufficient to cover the charges; to review matters pertaining to finances, sales, unfilled orders, plant, production, and such other matters as may come before the meeting.

"By order of the President.

"Very truly yours, Triumph Explosives, Inc., W. L. Kann, Secretary."

There is no reference to considering Elk Mills Loading Company.

Mr. Sobeloff: If you point that out, I take the opposite view. The call is very broad. It says to consider all matters pertaining to finances, sales, unfilled orders, and all of those matters. If you are going to read, I would like to have an opportunity to comment on our position.

[fol. 200d] Mr. Paisley: I next read notice of meeting of March 17, 1942, dated March 14, 1942. It says:

"A special meeting of the board of directors of Triumph Explosives, Inc., will be held in the offices of the company near Elkton, Maryland, on Tuesday, March 17, 1942, at 11 o'clock a. m., Eastern War Time.

"The purpose of the meeting is to review matters pertaining to finances, sales, unfilled orders, plant and production; to consider the payment of a dividend on May 1, 1942, to stockholders of record April 10, 1942; to consider the purchase of additional property; and to consider such other matters as may come before the meeting.

"By order of the President.

"Very truly yours, Triumph Explosives, Inc., W. L. Kann, Secretary."

Now, present at that meeting, according to the minutes, were Gustav H. Kann, Joseph B. Decker, Colonel A. P. Shirley, Van Dyk MacBride and R. V. Criswell. Do you have the minutes of this meeting, counsel?

[fol. 200e] Mr. Arenson: Your Honor, I desire to read to the jury the minutes of the meeting of October 1, 1942.

"A meeting of the board of directors of Triumph Explosives, Inc., was held at the offices of the company, Elkton, Maryland, at 10 a. m., October 1, 1942, in accordance with notice mailed to all directors September 24, 1942, a copy of which notice is attached hereto and made a part of these minutes.

"There were present the following directors: G. H. Kann, W. L. Kann, J. B. Decker, A. P. Shirley and Van Dyk MacBride.

"Mr. G. H. Kann presided, and W. L. Kann acted as secretary.

[fol. 200f] "Minutes of the previous meeting were read and approved.

"Mr. G. H. Kann advised the directors that the annual audit of the company's affairs was in progress and that Mr. Sabel had called a number of matters to his attention which he felt should be brought to the attention of the directors, and suggested that Mr. Sabel be invited into the meeting.

"Mr. Sabel entered the meeting and was requested by Mr. Kann to call the board's attention to the various matters which should be called to the attention of the directors. Mr. Sabel stated that there were certain companies handling subcontracts on Government work in regard to which certain questions had arisen.

"The first company to which Mr. Sabel called attention was Elk Mills Loading Company of Elkton, Maryland, a Maryland corporation, of which Triumph owns 55 per cent of the stock, and the balance of 45 per cent is held by the

following five employes of Triumph: Sidney Feldman, John Priol, Victor Willis, Arthur Deibert, William L. Kann, Jr. [fol. 200g] "Attention was called to the fact that the arrangement with the Elk Mills Loading Company had been discussed by the directors at their meeting held on December 11, 1941, at which time it was explained that although Triumph had been awarded a contract with Chemical Warfare Service for the manufacturing, loading, assembling and storage of certain incendiary bombs, which necessitated a considerable capital expenditure on the part of the company in the acquisition of additional lands, erection of buildings, and the purchase of machinery and equipment for the performance of such work, the company was not in a position to make such further or additional capital expenditures without the prior consent of the People's Pittsburgh Trust Company and the Federal Reserve Bank of Cleveland, this being necessary under the provisions of the existing loan agreement between the company and such banks, and that said banks had indicated their unwillingness to approve or consent to any further or additional capital expenditures. At said meeting of the board of directors their attention was also called to the fact that the employes owning the minority interest in the stock of Elk Mills Loading Company had [fol. 200h] caused such company to be formed, and had indicated their desire to take over the performance of said incendiary bomb contract by the Elk Mills Loading Company, the results of which would have been that Triumph would have lost the services of a number of their very important key men. It was, accordingly, arranged that Triumph should receive 55 per cent of the stock of the Elk Mills Loading Company in consideration of its subletting the work to be performed under the incendiary bomb contract at a certain price which immediately gave Triumph a profit, Triumph to receive an advance payment from the Government on said contract and in turn to make payments to Elk Mills on account of future deliveries to the extent necessary for the payment by Elk Mills of the necessary machinery, tools, equipment, etc. It was further agreed that in consideration of said five individuals transferring to said Elk Mills Loading Company, free and clear of all liens and encumbrances, land sufficient and suitable for the erection of the assembly and loading plant, Elk Mills Loading Company should issue to said five individuals 45 per cent of its stock. The board's attention was further called to the fact

that the aforesaid plan had been submitted to the banks, [fol. 200i] which banks had approved the same after securing the opinion of both counsel for Triumph, as well as counsel for the banks, that the same would not violate the terms of the loan agreement. Mr. Sabel then explained that although the stock had been issued and the contract entered into between Elk Mills Loading Company and Triumph and substantial performance made on said contract, nevertheless, the property on which the plant had been erected had not yet been paid for by the five individuals due to the fact that a certain defect in the title existed which was about to be remedied, if, in fact, it had not already been corrected. However, Mr. Sabel stated that when it was found that there was sufficient standing lumber on the property for the erection of the necessary buildings, and that the market value of such lumber aggregated at least \$12,000, the individuals had caused such lumber to be sold to the contractor for an amount approximately equivalent to the acquisition cost of the property, and that the contractor in turn billed said amount to the Elk Mills Loading Company, and that after he received payment therefor, he had sent his checks payable to the individuals for the lumber which they had billed [fol. 200j] to him. Mr. Sabel further stated that when this matter had been called to the attention of the individuals, they had agreed to return to Elk Mills Loading Company the proceeds from the sale of said lumber.

"After a thorough discussion it was suggested that it would be to the best interests of Triumph that Triumph own all of the stock of Elk Mills Loading Company, and that Triumph should request the individuals who now hold 45 per cent of the stock of Elk Mills Loading Company that they return such stock to Triumph in consideration of Triumph's readjusting the salaries of said individuals, and likewise making payment of the balance of the purchase price of said property as well as reimbursing said individuals for any cash expenditures which such individuals may have had in connection therewith."

[fol. 201] I would like to read the last paragraph of these Minutes of October 1st.

"The proper officers of the Company were requested to take action in connection with the various recommendations

of the Board and to report thereon at the next meeting of the Board."

Now, the Minutes of October 7th.

Present at this meeting on October 7, 1942: G. H. Kann, W. L. Kann, J. B. Decker, A. P. Shirley, George Van Dyk MacBride, I. A. Diamondstone, and R. V. Criswell, constituting all of the directors.

"There were also present Mr. John W. Townsend, Washington, D. C., counsel for A. P. Shirley and A. Leo Weil, attorney, of Weil, Christie & Weil, Pittsburgh, Pennsylvania, counsel for the Company."

"The minutes of the previous meeting were read and approved. After the reading of the said minutes Messrs. Shirley and MacBride asked that the minutes of the pre-[fol. 202]vious meetings of the Board of Directors referred to in the reading of the Minutes of October 7, 1942, be produced and read. After discussion, on motion duly made, seconded and carried, the following resolution was passed.

"Resolved, that the minutes of the Special Meeting of the Directors held on March 17, 1942, be amended by showing that at the time of the discussion and action taken in regard to Elk Mills Loading Company, neither Mr. A. P. Shirley nor Mr. VanDyk MacBride were present, nor were they until recently informed or advised of the Elk Mills Loading Company formation or status;

"Further, that said Minutes be amended by showing that the said Messrs. Shirley and MacBride left that meeting of March 17, 1942, before its termination and before discussion of either the Elk Mills Loading Company of bonus matter."

"Mr. Kann called the Board's attention to the fact that at the last meeting of the Board of Directors action had been deferred in regard to the Board's suggestions and recommendations concerning the Elk Mills Loading Company, Sussex Ordnance Company, Milford Ordnance Company, Maryland Display Fireworks Company, and Kent Defense Corporation.

"There followed a discussion reviewing the respective suggestions and recommendations.

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"On motion duly made, seconded and carried, the following resolution was passed:

"Resolved, that the proper officers of this Company be, and they are hereby instructed and directed to carry out, so far as possible, the several suggestions and recommendations in regard to the Elk Mills Loading Company, the Sussex Ordnance Company, Milford Ordnance Company, Maryland Display Fireworks Company, and Kent Defense Corporation."

And there are other matters.

Now, where are the Elk Mills Minutes?

I want to read from the Elk Mills Loading Company minutes Section 7 of the By-Laws as to the quorum of the Board of Directors.

"The majority of the members of the Board of Directors as the said Board is constituted in number on the date fixed [fol. 204] for the holding of any regular or special meeting shall constitute a quorum for the transaction of business; but if at any meeting there be less than a quorum present, a majority of those present may adjourn the meeting without notice other than by announcement at the meeting until a quorum shall attend. At any such adjourned meeting at which a quorum shall be present, any business may be transacted which might have been transacted at the original session of the meeting if a quorum had been present."

Reading from the Minutes of the meeting of the incorporators of Elk Mills Loading Corporation held at Elkton, January 2, 1942.

The incorporators being present were Frank W. Forrestell, Robert C. Downey, Jr., and Miss Valdah M. Bondurant.

After reciting that the charter had been granted and that the by-laws had been adopted, and so on, this appears:

"The Chairman then stated that the next order of business before the meeting was the election of directors to serve [fol. 205] until the next annual meeting of stockholders or until their successors are duly elected and qualified. Nominations were then called for and Messrs. J. B. Decker, G. H. Kann, W. L. Kann, Jr., Sidney Feldman and John Prial were duly nominated as directors. There being no other or further nominations, the chairman directed that the called for nominations be closed, whereupon, by unanimous vote

of all the incorporators present in person at the meeting, the chairman announced that Messrs. J. B. Decker, G. H. Kann, W. L. Kann, Jr., Sidney Feldman and John Prial had been unanimously elected directors of the corporation, to serve as such for the ensuing year or until their successors have been duly elected and qualified."

The By-Laws are copied into the minutes.

On January 2, 1942, Minutes of the meeting of the Board of Directors of Elk Mills: "There were present J. B. Decker, G. H. Kann, W. L. Kann, Jr., Sidney Feldman, John Prial.

"The Chairman then announced that at the meeting of the incorporators held immediately prior to this meeting, [fol. 206] the certificate of incorporation had been duly read and approved and directed to be spread upon the appropriate records of the Corporation," etc.

"The Chairman then announced that the next order of business before the meeting was the election of officers to serve for the ensuing year. Nominations being called for, the following individuals were nominated and unanimously elected officers of the corporation, to serve for the ensuing year or until their successors are duly elected and qualified, said officers being the capacity set opposite their respective names.

J. B. Decker	President
G. H. Kann	Vice-President
W. L. Kann, Jr.	Treasurer
Sidney Feldman	Secretary
R. V. Criswell	Comptroller

"The Chairman then suggested that the Board of Directors should fix the salaries to be paid these duly elected officers, and upon motion duly made and unanimously carried, it was agreed that until changed by the Board of Directors at a meeting duly called and held in accordance [fol. 207] with the by-laws of the company, the duly elected officers of the corporation should receive the salaries set opposite their respective names and offices, said salaries to be payable semi-monthly, on the 15th day and the last day of each and every month, beginning January 1, 1942.

J. B. Decker, President	\$5,200 per annum
G. H. Kann, Vice-President	\$5,200 per annum
W. L. Kann, Jr., Treasurer	\$5,200 per annum

Sidney Feldman, Secretary
R. V. Criswell, Comptroller

\$5,200 per annum
\$5,200 per annum

Then there is the recitation about the contract from Triumph being assigned to Elk Mills.

Mr. Sobeloff: What are you reading now?

Mr. Paisley: "The Chairman then stated that he was in a position to obtain immediately the services of three individuals, each of whom is well qualified to supervise and act as consultants in all matters pertaining to the construction and equipment of ordnance plants, and the manufacturing, loading and assembling of items of ordnance material. He announced that the services of the three individuals could be obtained at a salary of \$5,200 per annum to each, and because of the immediate need for the type of services which the individuals were qualified to furnish, recommended to the Board the employment of the three individuals, as consultants for the corporation.

"The Board, in considering the matter, called for the names of the three individuals to be employed, and was, by the Chairman, told that they were Messrs. John Prial, Victor Willis and Arthur Deibert. The Board then asked the chairman if, in his opinion, it was necessary to employ the three named individuals immediately. The Chairman answered in the affirmative, pointing out the absolute necessity of the immediate construction and equipment of an adequate plant, and the obligation of the corporation to promptly begin assembling operations on the item of ordnance material covered by the sub-contract which he felt sure the Company would obtain from Triumph Explosives, Inc."

"Whereupon, upon motion duly made, seconded and carried, the following resolution was adopted:

[fol. 209] "Resolved, That the President of the Corporation be and he is hereby authorized and empowered to employ Messrs. John Prial, Victor Willis and Arthur Deibert in the capacity of Supervisors and Consultants to the corporation, each at a salary of \$5,200 per annum, payable semi-monthly, on the 15th day and the last day of each and every month, beginning January 1, 1942.

"And be it further resolved, that the President of the corporation be and he is hereby authorized and empowered to employ the named individuals in the stated capacity for

a term or period of years which, in his judgment, will best serve the necessities of the corporation; that he may, or may not, in his discretion, negotiate and obtain a written contract from each, for the services to be rendered by each."

And then the next order of business was opening the bank account in the Peoples Bank there at Elkton, and so on.

And the land on which the building was to be constructed was described by metes and bounds, and it provides—

[fol. 210] Then there was presented to the meeting a proposal received from Sidney Feldman, John Prial, Victor Willis, Arthur Deibert and W. L. Kann, Jr., "wherein they proposed to sell, transfer and convey, by good and marketable title, free and clear of all liens and encumbrances, the following described tract of land to the corporation."

And then follows the description; and then: "in consideration of the issuance to them of 3,150 shares of the fully paid and non-assessable common capital stock of the Company in the following denominations:

"Sidney Feldman	700 shares
John Prial	700 shares
Victor Willis	700 shares
Arthur Deibert	700 shares
W. L. Kann, Jr.	350 shares

"Thereafter, the offer was thoroughly discussed by Mr. Decker and Mr. Kann, the Messrs. Feldman, Prial and W. L. Kann, Jr. taking no part in the discussion other than answering certain questions as to the location and description of the property. Upon motion duly made, seconded [fol. 211] and carried, the following resolution was adopted.

"Whereas, this corporation has received from Messrs. Sidney Feldman, John Prial, Victor Willis, Arthur Deibert and W. L. Kann, Jr. an offer to convey to the corporation by good and marketable title, free and clear of all liens and encumbrances the following described property."

And then it is described. And then:

"And whereas, in the opinion of the Board of Directors, it is to the best interests of this corporation"—

And then follows the written proposal of Elk Mills to take on the subcontract. The officers were authorized to enter into a subcontract with the Elk Mills to do the work.

The next meeting was on March 17, 1942. This is Elk Mills.

"There were present at the meeting in person:

"Messrs. J. B. Decker
G. H. Kann
W. L. Kann, Jr.
Sidney Feldman
John Prial

[fol. 212] being all of the directors."

Waiver of notice was read.

Mr. Sobeloff: Signed by whom?

Mr. Paisley: G. H. Kann, W. L. Kann, Jr., Sidney Feldman, John J. Prial, and J. B. Decker.

I will not read this meeting, but it was an approval of the arrangement whereby Triumph would do the work through the employees, and furnish the help, and so on.

Mr. Sobeloff: I think it might be well to read that in full so that the jury can get the exact plan that they had in mind and the reasons for it, as explained at the time.

Mr. Paisley: Well, I do not care to take up my time.

Mr. Sobeloff: I do not insist. I am just suggesting that it might be clearer.

Mr. Paisley: The contracts are going to be offered in evidence and the jury can read them.

Mr. Sobeloff: But, in all fairness, you are criticizing the action that the Board took at this meeting, and it seems to [fol. 213] me that when you read from the Minutes the action taken, you ought to read from the same minutes the paragraphs that explain the reasons.

The Court: Either side that wants to read them may do so. But it would just take up time when you express your views as to what Mr. Paisley ought to do.

Mr. Sobeloff: Well, if he will not do it, I will do it later. I can not insist upon his reading.

Mr. Paisley: I would like to read this paragraph of the Minutes of a Special Meeting of the Board of Elk Mills held on May 27, 1942.

Mr. Sobeloff: Will you give me that date again?

The Court: May 27, 1942.

Mr. Paisley: (Reading) "The Chairman then stated that the elimination of the difficulties attendant production and

the now satisfactory operation of the plant, coupled with the very favorable weekly production schedule, was attributable almost entirely to the ability of the management and the effort of certain of its technical advisors. By reason [fol. 214] thereof and by reason of the satisfactory financial showing of the corporation, he felt that an adjustment of the present existing fixed salary schedule for each of the officers and the technical advisors should be made, particularly since all were performing services of a value far in excess of that demanded of the salary received. The Chairman then recommended that a bonus of \$5,000.00 be paid to each of the officers and technical advisors to the corporation, and that payment thereof be made immediately, except in those cases where payment is not immediately desired, in which event the said bonus shall be carried on the books of the company as an account due the particular officer for his temporarily deferred bonus payment.

"After due consideration of the recommendation of the Chairman and after a thorough discussion by the members of the Board, of the operations of the Company, the production schedule, the previously existing attendant difficulties, the present financial condition of the condition and the present value to the corporation of the services of each of the individuals to participate in the recommended bonus [fol. 215] payment, the following resolution was, upon motion duly made, seconded and unanimously carried; duly adopted:

"Now, therefore, be it resolved that there be paid from the moneys of the corporation, a bonus of \$5,000.00 to each of the following officers of the corporation."

Mr. Sobeloff: I do not insist that he read all of the Minutes, although I think that would be much clearer. But when he reads a resolution and leaves out the "whereas" clauses that explain the reasons, isn't it very difficult to get a perspective of what happened there?

The Court: Have you omitted something that Mr. Sobeloff wanted you to read?

Mr. Sobeloff: If he does not do that, we will have to go through all of it again.

Mr. Paisley: There are four whereases.

"Whereas, the corporation has entered into a sub-contract with Triumph Explosives, Inc. for the loading and assembling of an item of ordnance material identified as 'Incendiary Bomb';

[fol. 216] "And, Whereas, shortly after the aforesaid subcontract was entered into, certain difficulties were encountered and certain delays were experienced which made it impossible for the corporation to fulfill the fixed monthly delivery schedule for the identified item;

"And, Whereas, the management of the corporation, together with certain of its technical advisors, have eliminated the difficulties responsible for the delay in the fixed production schedule as evidence by the supplemental contract approved at the meeting of March 17, 1942, so that at the present time, the scheduled production of the identified item is substantially in excess of the number of units required monthly, which excess will more than enable the corporation to make up any deficiency and thus enable it, again, to fully and satisfactorily complete its sub-contract;

"And, Whereas, the elimination of the attendant difficulties, it is recognized, is entirely attributable to the ability of the management and its technical advisors, whose present compensation is incommensurate with the value of the services rendered and to be rendered, in enabling the [fol. 217] corporation to fulfill its sub-contract, so that in view of the present satisfactory position of the company, provision for additional compensation should, in the judgment of this Board, now be made.

"Now, Therefore, Be It Resolved that there be paid, from the moneys of the corporation, a bonus of \$5,000.00 to each of the following officers of the corporation:

"J. B. Decker, President
G. H. Kann, Vice-President
W. L. Kann, Jr., Treasurer
Sidney Feldman, Secretary
R. V. Criswell, Comptroller

and a bonus of a like amount to each of the following technical advisors:

"John Prial
Viotor G. Willis
Arthur G. Deibert

said payment to be made immediately, and said payment to be in addition to the now fixed and established compensation each of the aforesaid now receives.

"And Be It Further Resolved, that in the event any of the aforesaid officers or technical advisors elect to defer the immediate payment of the aforesaid bonus, then and [fol. 218] in that event, an account shall be opened on the books of the corporation, reflecting the bonus as being due and payable to that said officer or technical advisor.

"There being no other or further business before the meeting, the same was, upon motion duly made, seconded and carried, declared adjourned."

Mr. Paisley: I would like to tender in evidence the bonus checks.

Mr. Sobeloff: I have no objection.

(The eight checks above referred to were then marked "Government's Exhibit No. 11.")

Mr. Paisley: Gentlemen, I have in my hands a series of checks for \$5,000, drawn on the Elk Mills Loading Corporation bank account in the People Bank at Elkton.

The first one is payable to V. G. Willis, Jr. And all of them are marked "Bonus declared May 27, 1942."

Also G. H. Kann, R. V. Criswell, A. G. Deibert, W. L. Kann, Jr., S. M. Feldman, John J. Prial, J. B. Decker. [fol. 219] I want to call your attention to the fact that some of them are signed by some officers and some by others. The check to Willis is signed by J. B. Decker and W. L. Kann, Jr.

The check to G. H. Kann is signed by himself as vice-president and W. L. Kann, Jr., treasurer.

The check to Criswell is signed by Decker as president and Kann, Jr., as treasurer.

They are all dated June 30, 1942.

All of the rest that I have in my hand are signed by Decker as president and Kann, Jr. as treasurer.

[fol. 220] Mr. Paisley: Yes, your Honor. I would like to tender in evidence Triumph Explosives check for \$40,000 to the Elk Mills Loading Company dated July 6th, 1942. There is no objection?

Mr. Sobeloff: No.

(Check of Triumph Explosives for \$40,000 to Elk Mills Loading Company dated July 6th, 1942 marked Government Exhibit No. 12.)

[fol. 221]

ARGUS F. ROBINSON

Direct examination.

By Mr. Paisley:

[fol. 222] Q. State your name, please?

A. Argus F. Robinson.

Q. What is your occupation?

A. Cashier of the Peoples' Bank in Elkton.

Q. Did Triumph Explosives, Incorporated, maintain an account at your bank?

A. Yes, sir.

Q. Did the Elk Mills Loading Corporation maintain an account there?

A. Yes.

Mr. Paisley: May I see that \$40,000 check, your Honor?

By Mr. Paisley:

Q. Have you brought with you a card, the ledger sheet, of Elk Mills Loading Corporation?

A. Yes, sir.

Q. Do you have it with you?

A. Yes, sir.

Q. I hand you a check for \$40,000, Government Exhibit No. 12. State whether or not that check was received by your bank?

[fol. 223] A. Yes, sir, it was.

Q. To whose account, if anyone's, was it credited?

A. It has stamped on the back "For Deposit only, Elk Mills Loading Corporation."

Q. Was it deposited in the bank?

A. There was a credit of that amount made the same day.

Q. Tell the jury what the balance in that account was at the time the \$40,000 was put in?

A. The balance prior to this \$40,000 deposit was \$1,313.12.

Q. And did it stay in there very long?

A. Eight checks of \$5,000 each was charged to the account over a period from July 10th, it stayed in four days.

Q. And reduced the balance—

A. Reducing the balance back to \$1,313.12.

Mr. Paisley: That is all.

Cross-examination.

By Mr. Sobeloff:

Q. You are an official of the bank in which both companies [fol. 224] had their accounts?

A. Yes, sir.

Q. You have no access to the records of the two companies?

A. No, sir, none whatever.

Q. You don't know how much money Triumph owed Elk Mills on the day it drew the \$40,000 check on account of the completed portion of any contract it had with it?

A. No, sir.

Q. You don't know what profits Elk Mills made up to the time of these payments?

A. That's right.

Q. All of those things are beyond you?

A. Yes.

Q. All you know is the checks here?

A. Yes.

Mr. Paisley: I would like to read from the minutes of the Special Meeting of the Board of Directors of Triumph [fol. 225] Explosives Incorporated held at the Robert Treat Hotel in Newark, New Jersey, on October 19th, 1942, at ten o'clock in the morning:

“Present, G. H. Kann, W. L. Kann, I. A. Diamondstone, A. B. Shirley, Vandyke MacBride.

Majority of the Board of Directors.

Also present, John W. Townsend, of Washington, D. C., counsel for Shirley; Mr. William Pepper Constable of Baltimore, Maryland, counsel for Mr. Decker. A. Leo Weil, Jr., of Weil, Christy and Weil, Pittsburgh, Pennsylvania, counsel for the company.

Mr. Constable stated that Mr. Decker's physical condition did not permit his attending the meeting and Mr. Constable was accordingly invited to attend the meeting in order that he might report to Mr. Decker the substance of the discussion had as well as the action taken.

G. H. Kann presided; W. L. Kann acted as secretary.

Minutes of the previous meeting of the Board of Directors, copies of which have been sent to the respective directors prior to the current meeting, were approved. Mr. Kann advised the Board of Directors that the action of the [fol. 226] Navy Department in taking possession of the plant and facilities of the company on October 13th, 1942 and their subsequent action in preventing the company's accountant from contacting or communicating with the officers of the company or its counsel had greatly handicapped and prevented the management from completing various recommendations of the Board of Directors as contained in the minutes of their meetings of October 1st and October 7th, 1942. Mr. Kann stated in spite of this, however, a conference has been had with all the individual stockholders of Elk Mills Loading Company, each of whom had agreed to promptly return to Elk Mills Loading Company his respective share of the proceeds of the sale of lumber as well as his individual stock. Mr. Kann stated he was under the impression that several of the individuals had already sent their checks and stock certificates to the Elk Mills Loading Company but because of being prevented, as stated, in contacting company's counsel or accountants in Elkton, he was unable at this time to report whether all the money and stock has as yet been returned as promised.

And then those other things relate to other matters.

[fol. 227] Lieutenant Commander JACOB S. SEIDMAN

Direct examination.

By Mr. Paisley:

[fol. 228] Q. Will you please state your name to the jury?

A. Jacob Stewart Seidman.

Q. Do you hold a commission in the United States Navy?

A. I am a Lieutenant Commander in the United States Navy Reserve.

Q. Were you in the Reserve force, Commander, before the outbreak of the war?

A. No, sir, I wasn't.

Q. What was your occupation in private life?

A. I am a certified public accountant. I am a member of the accounting firm of Seidman and Seidman.

Q. With offices where?

A. Throughout the country.

Q. Where did you maintain your office?

A. My headquarters were at New York but I was the administrative partner in charge of the various offices and was therefore around a great deal.

Q. Did you volunteer your services to the Government after the outbreak of the war?

A. Yes, sir.

Q. Are you a certified public accountant in New York [fol. 229] State?

A. In New York and in about twelve other States.

Q. Were you given any official duties to perform in connection with Triumph Explosives Incorporated?

A. Yes, sir.

Q. State to the Court and jury what your duties were?

A. On August 21, 1942, I was requested by the Navy Price Adjustment Board, which is a board that deals with the renegotiation of contract prices where it is believed that excess of profits exist, I was requested by that Board to go to the Triumph Explosives and meet with the auditor of that company in connection with an audit that was being performed for the fiscal year ended July 31st, 1942, and guide the auditor in respect to the information that would be requested by the Price Adjustment Board. I was also asked to review the accounting methods and procedures of the company and its budgetary policies to see whether I could offer any assistance to the company in those respects in view of the strained financial condition of the company. [fol. 230] Q. Who was the auditor who was then engaged in conducting the audit?

A. George J. Sabel and Company, of Pittsburgh.

Q. Certified Public Accountants.

A. Mr. Sabel is, yes.

Q. When did you first, at any time, meet the defendant G. H. Kann?

A. On August 21st, at Washington, at a meeting with the Price Adjustment Board.

Q. Was anything said in his presence or by him concerning Elk Mills Loading Corporation at that time?

A. Yes, sir.

Q. State to the Court and jury what it was?

A. One of the members of the Navy Price Adjustment Board inquired generally about the various subsidiary corporations of the Triumph Explosives and Mr. Kann and Mr. Sabel and Mr. Weil all participated in the discussion in respect to Elk Mills Company particularly. Mr. Kann indicated that the arrangement that existed between the Triumph Explosives and the Elk Mills was one whereby Elk Mills was operating at 10% above cost to Elk Mills; [fol. 231] in other words, making a profit of 10% on cost.

Q. Do you recall whether anything was said by Mr. Kann or in his presence at that time concerning the stock ownership of Elk Mills?

A. Yes, I am not sure whether Mr. Kann indicated this or one of the other representatives of the company but it was mentioned that 55% of the stock of Elk Mills was owned by Triumph Explosives and 45% by others.

Q. Was Mr. Decker present at that meeting?

A. No, sir.

Q. Any of the other defendants in this case on trial present at that meeting?

A. I am not so sure I know who the defendants are, but I can tell you the only representatives of the company present at that meeting were Mr. Kann, Mr. Criswell, Mr. Weil and Mr. Sabel.

Q. It was after that meeting, I take it, that you were assigned to go up to Elkton?

A. Yes, I arrived in Elkton on August 26th.

Q. Tell the Court and jury what you did in a general way?

[fol. 232] A. The first thing I did, I asked for an opportunity to go over the plants themselves so that I could get the physical background for the transaction and figures that I might see in the record. Then I asked for the general ledger of the company so that I could review that and quickly get the general feel of the situation. In that review or based upon a review of the general ledger, I asked for all sorts of information. I noticed the various subsidiaries. I asked about the minute books of the various

subsidiaries and asked for a great deal of supplementary collateral data.

Q. Did you ask for the books of accounts, including the minutes of Elk Mills Loading Corporation?

A. I didn't ask for the books of account because I was furnished with figures by Mr. Sabel purporting to come from the books but I did ask for the minute book for Elk Mills.

Q. And did you make an investigation to ascertain the facts concerning that corporation?

A. I never examined the records of Elk Mills; that is the books of account of Elk Mills. All information I requested [fol. 233] was furnished to me by Mr. Sabel. I did examine the minute books of the corporation and I did make inquiries of company's representatives about the whole set-up of the corporation.

Q. After you received this information and reviewed the minute book, did you discuss Elk Mills Loading Corporation with Mr. Kann or with others in his presence?

A. Yes, sir.

Q. When and where?

A. The first discussion was on September 10th at the office of the Triumph Explosives, in an office that had been assigned to me for the period of stay at the company. There was present, Mr. Kann, Mr. Weil and Mr. Sabel.

Q. Tell us now what was said?

A. We discussed the subsidiaries at this conference only in a general way. The particular situation was developed in this manner: I had been reviewing with Mr. Kann many transactions and then I asked him one general question and that is whether he derived any compensation or other returns from his connection with the corporation from out-[fol. 234] side the Triumph Explosives and from any of the other companies that were affiliated with Triumph Explosives and he said that except for a salary and bonus from Elk Mills Loading Corporation, he received nothing, and that was as far at that meeting that we went with a discussion of any subsidiaries.

Q. When was the next time you discussed it with him?

A. The next meeting took place on September 14th at the same place. At that meeting there were present, Mr. Kann, Mr. Decker, Mr. Weil, Mr. Sabel, Mr. Maxwell I. Cohen, who was introduced to me as an attorney representing Mr. Decker. At that meeting I inquired about all of the sub-

subsidiaries of the company. In respect to Elk Mills, I asked about the background of this organization. Mr. Weil said that though he had nothing to do with the organization of the company as such, he was familiar with its background and he said that it came into being primarily for two reasons: First was the fact that a number of key employees were pressing for higher compensation to the point where they had threatened to leave and it was desired very much to retain those employees and to meet their wishes for [fol. 235] higher compensation and the idea of a subsidiary corporation, from which they could draw compensation was evolved; the second factor that induced the formation of the corporation was the fact that the company required additional plant facilities in order to operate under the increased Government contract that it was facing. It could not without the bank's consent under the terms of a loan agreement acquire the additional facilities, whereas through a separate corporation it was thought that it might be possible to go ahead with those facilities and without reference to the loan agreement.

Q. I understand you are testifying to what Weil told you?

A. This is what Mr. Weil's explanation was. I asked Mr. Weil with respect to the first point, namely, about the employees, that in view of the fact that the compensation that was paid by the Elk Mills included Mr. Decker, Mr. Kann, Mr. Willis, a relative of Mr. Decker's, Mr. Kann, Jr., a relative of Mr. Kann, whether they were included among the people that were threatening to leave. Mr. Weil said no. Well, then, I said, as I understand it, that leaves [fol. 236] it just to Feldman, Prial and Deibert. I pointed out that from my study of the papers, a request was made of the bank in any event for the approval of the organization of the Elk Mills Loading Corporation and the plan that was put through and under those circumstances I said I was at a loss to understand why there was a separate corporation in view of the fact that the bank's permission was evidently thought necessary in any event so that the bank's permission could be sought for direct increases in compensation for those individuals and also for the additional plant facilities.

Mr. Weil said it was still thought advisable to handle it through a separate corporation and I asked that in view of the fact that the idea was to get these individuals addi-

tional compensation and merely additional compensation, I asked why it was that 45% of the profits that would otherwise go to Triumph Explosives was in effect being turned over to these individuals. Well, he said that was all part of the plan for the payment of increased compensation. I then made inquiries about the lumber transaction.

[fol. 237] The Court: How did you know anything about that?

The Witness: I was just about to lead up to that, your Honor. I said, as I understood the facts that were given to me by Mr. Sabel, the transaction took place involving certain lumber under the circumstances, that the Triumph Explosives had contracted in September, 1941 to acquire or had gotten an option to acquire certain lands, that it made a down payment in December, 1941 against that option or contract; that an additional payment had been made in March, 1942, that arrangements had been made by Triumph to get certain lumber off of that land and that the payment had been made of approximately \$4,000 to the individual to do the cutting. At that point, with the land presumably belonging to the Triumph Explosives, an arrangement was made whereby these key employees were to take over the contract for the land and turn it over to Elk Mills Loading Corporation as their contribution for the stock that had already been issued to these individuals. At this stage, therefore, the land belonged or presumably to Elk Mills Loading Corporation.

[fol. 238] Yet, in the face of that, the transaction appears to have been entered into whereby the lumber that was cut off the land was deemed to belong to these individuals instead of to the corporation and the price agreed upon for the lumber, the price charged to a Mr. S. R. Jackson, who was the contractor, doing certain construction work for Elk Mills Loading Company, and Mr. Jackson in turn paid that price to these five individuals. Mr. Weil said that as he understood it, that was the transaction.

The Court: Said that it was or was not?

The Witness: That it was the transaction, that he had not heard of it as it was being developed and that when he did hear of it, he disapproved of the transaction.

Mr. Kann said that the thing is wrong and that he would see to it that the thing was straightened out and that the lumber money was paid back or restored to Elk Mills and that the corporation was made whole.

Mr. Kann also said that if I objected to this Elk Mills transaction or the set-up of the stock, he would try to arrange to have the thing reversed and the stock of the key employees get back to the Elk Mills Loading Corporation, so that the Triumph would be a one hundred per cent. stockholder. I indicated that it was not my province to object or not to object but this session had been called merely to get explanations of transactions so that I could report the facts to the Navy.

Q. (By Mr. Paisley) One point, Commander, were you in the Court room this morning?

A. No, sir.

Q. You did not hear the testimony?

A. No, sir.

Q. Who paid for the cutting of the lumber according to your investigation and discussion of it with these gentlemen?

A. The Triumph Explosives, I understood it, paid for it, there was some \$3800.

Q. Was there any discussion between those present at that meeting as to the financial standing of Elk Mills Loading Corporation; that is, whether it had been making money or not?

[fol. 240] A. Yes, sir, I had a memorandum of figures which had been presented to me by Mr. Sabel and I mentioned that the figures down to July 31, 1942 showed that on approximately \$600,000 of sales, there were profits of about \$235,000 before taxes, and that was about 65% on cost instead of the 10% that was indicated at the August meeting and it was merely indicated that the operations turned out very much more profitable than anticipated.

Q. Do you recall whether or not that that figure of approximately \$235,000 was before or after officers' salaries?

A. It was after all officers' salaries and bonuses. I think there were about \$65,000 of salaries and bonuses up to that date.

[fol. 241] Cross-examination.

By Mr. Sobeloff:

Q. Commander Seidman, you told us about some meeting in Washington.

A. Yes, sir.

Q. That was before the Price Renegotiation Board of the Navy, wasn't it?

A. Yes, sir.

Q. And you say that Mr. Kann was asked about earnings of certain companies, and he said that it was approximately ten per cent above cost of Elk Mills?

[fol. 242] A. That is correct.

Q. Was it rather an estimate? Precisely what was that? Suppose you explain it.

A. As compared with the arrangement with the company, or, for that matter, with the other subsidiaries as well, that these subsidiaries would make a profit of ten per cent above the costs that they incurred in connection with the subletting of the Triumph contracts to these subsidiaries.

Q. At the time of that meeting were the figures of the actual earnings for that fiscal year ready?

A. Not for the subsidiaries. No figures were submitted for the subsidiaries, and only tentative figures were submitted for Triumph Explosives.

The Court: This was in August, 1942?

Mr. Sobeloff: Yes.

The Court: There are already in evidence the results of July, 1942 for this Elk Mills.

Mr. Sobeloff: That is true. But the precise figure was subject to audit, and that audit was not completed when Commander Seidman—

[fol. 243] By Mr. Sobeloff:

Q. And that audit was not completed until when, Commander Seidman?

A. I have never ascertained whether the audit had ever been completed.

Q. It was long after that meeting?

A. Yes.

Q. Long after?

A. Yes, sir.

Mr. Sobeloff: Thank you.

The Court: Is that all you want to ask him?

By Mr. Sobeloff:

Q. You did not have those figures as long as you were at Elkton? It was not completed before you left Elkton?

A. No, sir.

Q. When did you leave Elkton?

A. Somewhere between September 22nd and 24th—one of those three days.

Q. When did you first learn or, so far as you know, when did Mr. Kann first learn of this lumber deal?

[fol. 244] A. I don't know. I never asked him.

Q. Didn't you tell him about the lumber deal?

A. Oh, yes.

Q. Did he say that he knew about that then or that he did not know about it before?

A. Nothing specifically was said on that, but he merely said that the thing was wrong and that he would see that the thing was corrected.

Q. You have no knowledge that he knew of it before you called it to his attention?

A. No, sir.

JOHN H. LUCAS

Direct examination.

[fol. 245] By Mr. Paisley:

Q. Will you please state your name, your place of residence, and your business to the jury?

A. John H. Lucas. I am a banker, located in Mount Lebanon, City of Pittsburgh, Pennsylvania.

Q. With what bank are you associated?

A. The Peoples-Pittsburgh Trust Company.

Q. In what capacity?

A. Vice-president and chief loaning officer.

Q. Do you know Gustav H. Kann?

A. Yes, sir.

Q. How long have you known him?

A. Since about 1929.

Q. Did the Triumph Explosives, Inc. maintain a bank account in your bank?

A. Yes, sir.

Q. Over what period of time?

A. Well, from about 1930 to 1931 up to date, up to and including yesterday, so far as I know.

Q. Did it maintain loans at your bank also?

A. Yes, sir; it did.

[fol. 246] That is, Triumph Explosives, Inc., did?

A. Yes, sir.

Q. Who negotiated the loans with you on behalf of Triumph?

A. Mr. G. H. Kann.

Q. Did he live in Pittsburgh?

A. Yes, sir.

Q. Did you have loan agreements with Triumph Explosives, Inc., that is, written agreements with terms, other than the note itself?

A. In the early days of the Triumph Fusee and Fireworks Company, the original name of Triumph Explosives, we did not have loan agreements, up to the point where we had loans of \$350,000 or \$400,000; but when the loans became higher we did have loan agreements with Triumph Explosives, Inc., the new name for the old Triumph Fusee & Fireworks Company.

Q. Mr. Lucas, I do not believe it will be necessary to produce those documents here that the indictment speaks of; but I will ask you this question:

This loan agreement contained provisions to the effect [fol. 247] that salaries of employees who were drawing over three hundred thousand dollars—

The Court: Drawing how much?

By Mr. Paisley:

Q. I mean \$3,000—could not be approved or could not be permitted without the Bank's approval? Is that right?

A. The first loan agreement did have that provision in it. Later on the loan agreement increased the salaries up to \$7,500 without permission.

Q. They were the only two, were they not?

A. No, sir. We have really had three loan agreements already with Triumph.

Q. I mean the restriction on salaries was \$3,000 at one time, and then when the loan was increased you did not care about approving them in general over \$7500?

A. Yes; but we still have another agreement with the present Triumph Explosives, which has increased that up to \$10,000.

Q. Did you also have power to pass upon capital expenditures by Triumph?

[fol. 248] A. Yes, sir.

Q. I will ask you this, Mr. Lucas. At any time did the Bank refuse to increase salaries of employees of Triumph when a request was made for it in writing?

A. Mr. Paisley, we did not increase the salaries. We could only approve the increase in the salaries.

Q. That is what I asked.

A. I thought you said: did we?

Q. Approve the increase?

A. Yes; we always approved of the increases after they were given to us in writing as to who the parties were, what their positions were, and that was submitted in writing to us. We would then submit that, after we had decided about it ourselves, to the Federal Reserve Bank at Cleveland, who had a repurchase agreement with us in the early part of this loan for 50 per cent of the unpaid balance at any time. Although the loan agreement did not call upon us to ask their approval, when the loan was originally negotiated those conditions were put in in a letter to me, and even though when the last agreement came back it did not say that we had to get their approval, we [fol. 249] continued to present to them these salary permits and these increases in capital expenditures in order that there would never be any disagreement as to what we had done, even though we had a right to do it ourselves.

Q. Did Triumph Explosives request you to approve increases from time to time?

A. In salaries, yes; and in capital expenditures, yes.

Q. And as I understand your testimony, at no time did you turn them down.

A. No; not up to the point where the loan agreement permitted it, as long as it was justified. In other words, as long as they did not go over the amount mentioned in the loan agreement; article 33—as long as it did not go over that and they could assure us that it was necessary, at no time did we turn them down.

Q. Are you speaking now about salary increases?

A. I am speaking about the capital expenditure increases.

Q. We haven't gotten to that.

[fol. 250] A. Oh, I beg your pardon.

Q. Let's take salary increases. You say that requests were made from time to time to increase salaries?

A. Yes, sir.

Q. And you approved them?

A. Yes, sir.

Q. Was there any occasion when the Bank did not approve any of the requests for increases in salaries?

A. There were occasions, sir, when we did not approve them right away, but we wanted to get more information; but eventually we did approve, yes, sir.

Q. Now, speaking about the capital outlays, was your Bank requested by Triumph Explosives from time to time to approve of increases in capital expenditures by Triumph, Mr. Lucas?

A. Yes, sir.

Q. And did you approve or disapprove?

A. We approved them so long as they did not exceed the limitations put forth in Article 33 of the loan agreement.

Q. What was the limitation in the first loan agreement? [fol. 251] A. The first loan agreement, dated March 11, 1941, expiring March 1, 1942, was \$160,000; and a supplement to that loan agreement, at which time the loan had been increased from \$650,000 to \$1,250,000, supplement dated August 14, 1941; the capital expenditures were increased to \$240,000 from \$160,000; and later, on November 28, 1941, to \$300,000.

The Court: I doubt very much whether this particular testimony is going to be understood unless we know precisely what the loan agreement was, or that section of it that refers to this matter of capital improvements. I do not quite understand myself just what it is.

Mr. Paisley: Will there be any objection to reading into the record this article relating to capital expenditures?

The Court: No; if it is not too long. I suppose it will have to be read, anyway.

How long is it?

The Witness: Article 13 is about ten lines.

The Court: All right.

The Witness: "Article 13. Agrees that so long as the [fol. 252] undersigned—" And that is the Triumph Explosives—"is indebted to Bank in connection with said loan, the aggregate and individual compensation—such term including all salaries, fees, bonuses, retainers, regular drawing accounts, and other payments, direct or indirect, in moneys or otherwise, for personal services paid to its

officers, directors, employees, partners, if any, and attorneys or firms of attorneys on a retainer or salary basis, shall be in such amount as may be deemed reasonable by Bank for the services rendered, shall be subject to review by Bank and shall be revised as requested by Bank;

"And further agrees that before it increases the compensation, as such term is defined in this article, of any of its officers, directors, employees, partners, if any, and attorneys or firm of attorneys, if any, receiving \$2,000 or more per annum, whose compensation has been approved by Bank, or increase of compensation of any of said person or persons to \$3,000 or more per annum, or engages any person or persons in any such capacity or activities who are to receive \$3,000 or more per annum, it will get the [fol. 253] written consent of the Bank thereto".

The Court: Now; that is salaries. What about capital expenditures?

The Witness: "Article 33. Agrees that it will, neither make nor commit itself to make, prior to March 1, 1942, except with the prior written consent of the Bank, any capital expenditures in an amount which, when added to the amount of all other capital expenditures which the undersigned has made or committed itself to make during the period from August 1, 1940 to March 1, 1942, will exceed the sum of \$160,000.

By Mr. Paisley:

Q. Now, Mr. Lucas, you were telling us how much the loan was in November, 1941 and what the limit was on capital expenditures. What were those figures?

A. The original loan was \$650,000; the capital expenditures were \$160,000 limitation; the salary limitation of \$3,000.

The supplemental loan agreement to that original loan was \$650,000. The loan was increased to \$1,250,000. That was the limitation of the loan. On August 14, 1941. The [fol. 254] salaries were permitted, in section 13, to remain the same, at \$3,000.

Article 33 was changed to permit expenditures up to \$240,000, and later, on November 28, 1941, it was permitted to go up to \$300,000.

Q. What was the amount of the loan at that time in 1941?

A. On November 3, 1941, the loan was \$896,215.57. At the end of that month it was \$929,945.74.

Q. Was the loan subsequently increased?

A. Yes, sir. The loan was later increased in January, and it went up on January 21st to \$1,143,627.66.

Q. That was 1942?

A. Yes, sir.

[fol. 255] Q. Can you tell the jury approximately how many times, if at all, the Bank was requested by Triumph to permit capital expenditures in excess of the limitation provided in the loan agreement?

The Witness: I don't think I can answer that question, Mr. Paisley. I don't believe I know. They knew definitely that we would not permit any expenditures over and above the loan agreement. They knew what this loan agreement said; and I would not have expected them to come to ask [fol. 256] me to make these expenditures without their putting it in writing. I know that they would come in and say that they had numerous contracts that they could get; but we told them that this was the capital limitation and we did not expect them to go beyond it. And that was also the opinion of the Federal Reserve Bank at Cleveland.

Q. Perhaps I misunderstood your testimony, Mr. Lucas. Were there occasions when you did approve increases in the capital expenditures over and above the limitation?

A. Not without first getting a limitation increase.

Q. That is, by amending the agreement?

A. Yes, sir; that is right. That is what I mean.

Q. But you would go through that procedure?

A. Oh, yes. Yes, sir; we had to go through that procedure.

[fol. 257] Q. Now I will ask you specifically, Mr. Lucas, were you ever requested to approve this Elk Mills Loading Corporation?

A. We had the proposition submitted to us a few days prior to December 15, 1942. I received a telephone call from A. Leo Weil, Jr.; counsel for this company, and he told me over the telephone about the Triumph Explosives, Inc. hav-

ing received a contract for the manufacture of incendiary bombs; and I suggested that he come down and discuss it with me in person rather than by telephone.

He came down—I think it must have been a day or two prior to December 15, 1941—and discussed that matter; and I took him into the offices of the Chairman of the Board of our Bank.

[fol. 258] The Court: Just to get the date right, what was the date of incorporation of Elk Mills? It was December 2nd, wasn't it?

Mr. Paisley: December 2, 1941.

The Court: Now, you tell us that you heard nothing about Elk Mills or any related thing like that from the Triumph until about December 15th?

The Witness: About December 15th or 14th.

The Court: And it began with a telephone conversation in which Mr. Weil said, when he called you, that the Company, that is, Triumph, had received a large ammunition contract from the Government?

The Witness: Yes.

The Court: Did he say why he was calling you on that occasion?

The Witness: I can refer to a written memorandum that I made of the conversation, Your Honor.

Mr. Sobeloff: I have no objection.

The Court: Go ahead.

The Witness: On December 15th Mr. Weil then came down to the bank and gave me—I might say that he came [fol. 259] down to the Bank and discussed with us this matter, delivering to us a written letter signed by Mr. Weil, or by Weil, Christie & Weil, as counsel for Triumph.

[fol. 260] This letter was presented to the Chairman of the Board of our bank, the Chairman of the Executive Committee of our Board, Mr. J. L. Miller, and to myself, and we discussed this with Mr. Weil, and we told him this was a matter which would have to be taken up with the Federal Reserve Bank of Cleveland, inasmuch as they were under a 13-B type of loan. Therefore, although the loan agreement did not call for us to submit this to them, we thought in fairness it should be done, and Mr. Miller, the Chairman of the Executive Committee of our bank, and Chairman of the Board, Mr. Guthbert, and I suggested we go to Cleveland the next day, to Federal Reserve Bank of Cleveland, and take the matter up with Mr. Zurlinden, Vice-President

of the Federal Reserve Bank. This we did, and Mr. Weil, and my notation dictated that day says—

Mr. Sobeloff: What date is this?

The Witness: On December 18th I wrote a resume of this report of the trip to Cleveland.

Mr. Sobeloff: I do not want to interpose an objection, but don't you think it would be more understandable if you first [fol. 261] read the letter of the 15th and then the memorandum?

Mr. Paisley: Let him testify any way he wants.

The Witness: I would rather tell it my own way.

Mr. Sobeloff: All right, just as you say.

A. Mr. Weil and I went up to Cleveland and I took with me this letter of December 15, 1941, written by Mr. Weil relative to this incendiary bomb contract and the creation of a new company, and so forth, which I will touch on later. We submitted that to the Federal Reserve Bank of Cleveland, to Mr. Zurlinden, Vice-President of the Federal Reserve Bank of Cleveland, and he called in Mr. Southworth, as I recall, their counsel. We had a considerable discussion on that and it lasted three or four hours. Mr. Weil and I came home on the afternoon train, left there about five o'clock, and while in Mr. Zurlinden's office, he suggested that we submit this letter to our counsel, Patterson, Crawford, Arenberg & Dunn, and to let him have a written copy of whatever opinion we received from our counsel.

[fol. 262] On December 22, 1941, I wrote to Mr. Zurlinden to the effect that upon our return from Cleveland I discussed with several of our officers the conversation he and I had with Mr. Weil and our subsequent conversation. In that subsequent conversation we invited Mr. Weil to get out of the room so we could discuss it ourselves. It was suggested I submit Mr. Weil's letter to our counsel for their opinion. This was done, and I am enclosing a copy of the opinion written by Mr. Ferguson, who was a member of the firm of Patterson, Crawford, Arenberg & Dunn, and concurred in by Mr. Arenberg, who was the chief counsel, the head of the firm—

The Court: Do you want all of this? Of course, it is out of the presence of the defendant.

Mr. Sobeloff: I have no objection, because that is the crucial thing of the case.

By Mr. Paisley:

Q. Well, the upshot of it all was that the Bank did approve of the Elk Mills Loading Corporation as not being a violation of the loan agreement; is that right?

A. The bank did not either approve or disapprove. In [fol. 263] other words, we asked our counsel whether or not this was a violation of the loan agreement, our counsel told us in writing, which we submitted to the Federal Reserve Bank, as follows: "The plan outlined is obviously an arrangement to permit the Company to accept the incendiary bomb contract even though it could not be performed under a strict compliance with the terms of the loan agreement. We have not found any provision in the loan agreement which would prohibit the Company from proceeding with the plan outlined above. None of the proceeds of your loan will be used either to finance the subsidiary company or to finance the incendiary bomb contract."

Q. The Government was going to do that, weren't they.

A. Yes, sir. The Government was going to do that, and they were doing that by advance payments to Triumph, which Triumph, in turn, passed on to the Elk Mills. "We understand it can only be used for the purpose of completing the incendiary bomb contract. If the Company themselves proceed with the plan, we do not believe you would have any [fol. 264] right to declare any default under the provisions of our agreement. Then they say this: "And even if the participation of the ownership of the Company should be prohibited by the agreement, we do not believe, as a practical matter, that your company could afford to declare a default in its loan. If the loans were to be called, the company would be faced with either ruination or Government operation of its plant, or with the necessity of financing its contracts, or financing elsewhere. If it were possible to force the Company to breach the contract with the Government and we have this default, severe penalties or Government operation might be the result. Either action, therefore, would not improve the present position of your loans. The matter, of course, should be submitted to the Federal Reserve Bank, who will no doubt wish to have their attorneys pass upon it."

Q. Well, at the time—

The Court: I think really somebody ought to ask this witness what it was that the Triumph asked the bank to do.

[fol. 265] Mr. Sobeloff: His letter of December 15th, Your Honor.

The Court: All we know is that—

Mr. Paisley: We have the original letter here, if your Honor want it put in evidence.

The Court: I do not know that it is necessary to put the letter in, but let the witness state how this thing began and what it was the Triumph asked.

By Mr. Paisley:

Q. Is that the letter that you got?

A. Yes, sir.

Q. Was it written before your discussion with Mr. Weil.

A. It was written after the preliminary discussion with Mr. Weil by telephone.

Q. And you told him to put it in writing?

A. Yes, sir.

Q. And this is it.

Mr. Paisley: Let us have it identified.

(Letter referred to marked and filed in evidence as Government Exhibit No. 13 for Identification.)

[fol. 266] Q. Did they want to go above the limit?

A. They had taken a contract on which they were called up to spend \$200,000 or \$300,000 in fixed assets, and to our surprise, they told us they obtained that contract and the loan agreement did not permit them to spend that amount of money in addition.

Q. Did you understand the Government was to furnish an advance of around \$300,000 or \$400,000?

The Court: I think you have to read the letter, because [fol. 267] apparently we can not get along without having that letter read.

Mr. Arenson: Letter from Weil, Christie & Weil, dated December 15, 1941:

"People-Pittsburgh Trust Company, Fourth Avenue and Wood Street, Pittsburgh, Pa.

"Attention John H. Lucas, Esq.

"DEAR SIRS:

"We desire to confirm conversation of some days ago between you, Mr. G. H. Kann, and the writer relative to

Triumph Explosives, Inc., and with particular reference to the consummation of a contract awarded to Triumph for the manufacture of incendiary bombs.

"You will recall that we explained to you that Triumph had been requested to bid by Governmental agencies on the manufacture of incendiary bombs; that Triumph was not particularly desirous of undertaking this type of work inasmuch as under no circumstances could the manufacture and loading of these units be performed at or even adjacent to the present plant of Triumph. Nevertheless, Triumph, by reason of the nature of its business as well as its [fol. 268] standing and reputation, could not refuse to bid, and was somewhat surprised to find that it, among other companies, had been awarded a contract for this item, aggregating approximately \$1,500,000.

"You will further recall that when the matter was first discussed with you as to obtaining the approval of the banks, which approval is necessary under our loan agreement, for the expenditure by Triumph of approximately \$200,000 additional for land, plant and equipment, you strongly indicated that you had serious doubts as to whether either your bank or the Federal Reserve of Cleveland would be willing to grant such approval.

"Since such time, Triumph was faced with a very serious situation, namely, the possibility of losing four of its key men whose loss, particularly at this time, would be a serious blow to the company. These men felt that the time had arrived for them to sever their connections with Triumph and organize their own company with the thought that there was so much work to be done for both the Army and Navy, that such new company would be able to obtain substantial contracts. In fact, one or more of these parties [fol. 269] had already caused a corporation to be incorporated and had obtained options for the purchase of certain property at Elkton, Maryland, some two miles distant from the property owned by Triumph. In addition, these four men had proposed to Triumph that through their new company they would be willing, if Triumph desired, to undertake the performance of the incendiary bomb contract, at a figure of approximately 10 per cent less than the face amount of the contract awarded to Triumph.

"In view of the foregoing situation, first, the refusal on the part of the banks to permit Triumph to expend approximately \$200,000 additional for capital assets; sec-

ond, the threatened loss to Triumph of the four key men so important to its organization, and, third, the formation of a company which in the future might perform work very similar to that in which Triumph is engaged—it is proposed to solve the dilemma as follows:

“1. To have the four key men personally acquire the land on which they have an option and turn this property over to the new corporation in exchange for 45 per cent of the stock of such new company.

[fol. 270] “2. For the new corporation to offer to manufacture for Triumph the incendiary bombs for which Triumph has a contract, as stated, at a price which will give Triumph a profit of 10 per cent upon the face amount of the contract.

“3. That in consideration of Triumph entering into such agreement with the new corporation, the new corporation will agree:

(a) To turn over to Triumph 55 per cent of the capital stock of the new corporation.

(b) That the Board of Directors of the new corporation shall consist of either three, in which event two shall be nominees of Triumph; or five, in which event three of the board of directors shall be nominees of Triumph.

“The work under the new contract can be financed by Triumph securing from the Government an advance of approximately 30 per cent on its contract with the Government, such advance thus aggregating approximately \$450,000. Triumph will agree from time to time to make advance payments to the new corporation on account of deliveries by the new corporation to it, such advances to be sufficient to pay for the plant, machinery and equipment which, as stated, should not exceed \$200,000; and the balance of such advance payments to the extent necessary will be sufficient to provide the necessary working capital for the completion of the contract.

“For your information this contract is to be completed within a period of twelve months, and as the units are completed they are to be placed in the warehouse of the new corporation, payment being made under the terms of the contract as said units are placed in the warehouse.

"For your information we might also add that Triumph, as a part of this plan, will require the four key men involved to enter into employment contracts with Triumph covering a period of years. In this way, we believe that Triumph can be protected in the future.

"We do not believe that the foregoing plan in any way contravenes the terms and conditions of the loan agreement between Triumph and the banks. Nevertheless, we desired that you be fully informed in the premises as our [fol. 272] clients did not wish to take this step without giving you full and complete information in regard thereto.

"Yours very truly, Weil, Christie & Weil."

The Court: Now, the net result was that the banks took the position that that form of undertaking would not be in violation of the loan agreement; is that right?

The Witness: Yes, sir.

The Court: And that is all there is to it, isn't it?

The Witness: Yes, sir.

The Court: I would like you to tell me, if you know, what is the purpose of this limitation as to capital expenditures in these loan agreements. Why is the bank interested in that?

The Witness: Your Honor, the purpose of this money was for working capital to be put not in machinery, real estate, tools, fixtures, and so forth, but for the purpose of buying raw material and labor, and so forth, and working capital; and if a company needs money for working capital, [fol. 273] we don't expect it nor does the Government guarantor in these V loans, as we call them, we do not want them to put that money into fixed assets unless it is necessary. In other words, if they need money to buy labor, raw materials, and so forth, we can not afford them running out and putting it into fixed assets.

The Court: Is it simply you do not want them to use the money you have loaned them for buildings and fixed capital assets like that? Or do you also want to prohibit them from using moneys that they get from other sources in capital assets such as buildings? In other words, suppose they had sold additional stock to the public and realized a half million dollars from the sale of stock, would you, as a bank, have any reason to prohibit them from building a \$500,000 office building?

The Witness: No, sir; no, sir.

The Court: Then the purpose of your limitation in your loan agreement is simply to keep them from using money that you have loaned them for working capital for buildings and capital assets of that kind?

The Witness: That is right.

[fol. 274] The Court: Working capital, of course, is itself a capital asset, isn't it?

The Witness: Yes, sir.

The Court: Perhaps I may have a better understanding of it now. Anything else?

Mr. Sobeloff: Yes, I think I would like to go a little more deeply into that last phase that your Honor pointed out.

(Letter previously marked and filed in evidence as Government Exhibit 13 for Identification.)

(Cross-examination.)

By Mr. Sobeloff:

Q. Mr. Lucas, I would like to get a little further explanation of the reason why the bank so carefully stipulates a limit on the amount of capital invested in land, buildings, machinery and equipment. Is it intended merely to prevent the investment in such fixed assets of the very dollars [fol. 275] that are borrowed from your bank; or is the purpose broader, to protect the bank by protecting the debtor against having too much of its capital tied up in such fixed assets, capital from other sources even?

A. You must understand there are various types of money that is borrowed. Current bank loans are borrowed for the purpose of paying labor, buying raw material, and so forth, during the performance of a contract, and if a company wishes to borrow money from a bank and that bank lends its demand funds, demand deposits, the bank must be in a position not to jeopardize those funds by having them placed in land, buildings, plants, and machinery, or bricks and mortar, as it is often called, but to keep those funds in liquid assets or quick assets. The purpose of that is to make certain that the company can at all times, upon the maturity of the note liquidate that note and get the funds back into the bank to meet demand deposits. If we

were to permit the company to spend all of the proceeds of this loan in bricks, mortar, machinery and equipment, we would have taken a longer term loan; two three, four, [fol. 276] five, or ten year loan.

By Mr. Sobeloff:

Q. Mr. Lucas, even though they did not directly employ the money they borrowed from you in investment in land [fol. 277] and fixed assets, but while owing you this money, borrowed from another source some money and tied it up into fixed assets, would you permit that?

A. No. Under the terms of the loan agreement they could not borrow from another source because they were not permitted to do so.

Q. Isn't the reason for that prohibition the fact that it would impair your ability to collect the debt when it fell due?

A. That is one reason. But the second reason is so we must know what they are doing all the time.

Q. Now, if the Government were to advance Triumph \$450,000, a sum, say, \$450,000, would you have permitted Triumph out of that to invest about \$200,000 or \$250,000 in the construction of buildings, as was contemplated would be necessary if it were to carry out this incendiary bomb contract?

A. I don't know whether we would have or not. That would have been submitted to our committee and submitted to the Federal Reserve Bank to arrive at our decision as to what our bank and that committee would do. Whether [fol. 278] we would have done it, I don't know, but under the terms of the agreement we could not have done it without first extending the terms of the agreement.

Q. Now, let us get a perspective on altogether the range of permissible assets at the time we are discussing, December, 1941—

A. \$300,000.

Q. \$240,000, wasn't it?

A. No, \$300,000.

Q. How is that \$300,000 computed? Did that mean they had \$300,000 free that it could invest or did it mean that the aggregate investment in fixed assets, accounting from August 1, 1940, down to the maturity date of the loan at

some future time in 1942 had to be included in that?

A. Yes. That meant that from August 1, 1940, down to November 28, 1941, they should not be allowed to spend more than \$300,000.

Q. So that of the \$300,000 at the time that this limit was put on, some of it was already invested?

The Court: How do you know that? There is no evidence of that yet.

[fol. 279] Q. Do you know how much they had? Did you have a financial statement of this company at the time?

A. Yes. We had statements, that is right.

Q. Can you either from recollection or by referring to some record tell us approximately how much this company had invested in fixed assets, land, buildings, equipment and machinery?

The Court: Do you mean from the beginning of time?

Mr. Sobeloff: No, at the time of this discussion.

A. What is the date?

Q. About December 15th, the time of this letter, and then you make the computation and tell us how much under the conditions then prevailing the company could, without violating its agreement with you, further invest in fixed assets?

The Court: I do not think it is necessary to go into that. The implication is that it could not. That is to say, it would have reached beyond the limit if it had spent something like \$200,000 for these new buildings.

Mr. Sobeloff: Oh, it would have exceeded away over. They had only a small part of the \$300,000 actually available, and \$200,000 was away beyond.

The Court: As a matter of fact, isn't the evidence so far that whatever was spent was spent by Triumph for these new buildings?

Mr. Sobeloff: Oh, no. What was spent was advanced by Triumph, but it was all repaid by Elk Mills as it got the money from the Government.

The Court: We have not heard any evidence of that yet.

Mr. Sobeloff: No, I understand that, but it is a fact.

The Court: It may be you will show it as a fact by evidence, but there is no evidence yet before this jury that anybody paid for any improvements here except Triumph.

Mr. Sobeloff: I understand; and that is why I tried earlier

to ask Mr. Paisley to state his position and he preferred to leave it uncertain.

Q. Now, can you answer the question, Mr. Lucas?

A. Will you repeat the question?

(Question read by the reporter.)

A. As of what date?

[fol. 281] Q. On December 15th.

A. I can only give it to you along about the latter part of November.

Q. That will be close enough.

A. They had already spent all of the amount permissible—they had already spent \$293,857, according to their figures.

Q. Now, I want to ask you whether under this agreement that you have with this company all of the \$300,000 or only the difference between the \$293,000 and the \$300,000 was still permitted to be invested in fixed assets?

A. That is right; yes, sir.

Q. How much, all or the balance?

A. Oh, the difference, approximately \$6200.

Q. That \$6200 was all that it could invest in capital assets under your agreement for how long a period; how long would that have to last them?

A. Up until August 14, 1941, the termination of the loan agreement.

Q. The following August would be 1942.

The Court: He said 1941.

[fol. 282] Mr. Sobeloff: Yes, I know.

The Witness: That was permissible up to November 28, 1941.

Q. Up until November 28, 1941. Well, at any rate, there were only about sixty odd hundred dollars not exhausted under the permissible capital expense account?

A. That is right.

Q. Did that capital expense account of \$6200 have to last it through this contract alone or all of its contracts?

A. All of its contracts, but it still was able to go along and discuss—if they had contracts that required additional fixed assets, to come in and ask us to increase the fixed assets, and it was up to us to decide whether we wanted to do it or not.

Q. Yes: In that connection, I want to call your attention to a paragraph in the letter Mr. Weil wrote to you, this third paragraph, and you presented this letter to Mr. Zurlinden, and counsel of your bank, did you not?

A. Yes, sir.

Q. I will ask you whether this paragraph was known [fol. 282a] to you at the time to be a correct statement: "You will further recall that when the matter was first discussed with you as to obtaining the approval of the banks, which approval is necessary under our loan agreement, for the expenditure by Triumph of approximately \$200,000 additional for land, plant and equipment, you strongly indicated that you had serious doubts as to whether either your bank or the Federal Reserve of Cleveland, would be willing to grant such approval." That was a fair statement of the conversation, was it not?

A. I think that was a fair statement of the understanding we had with the officers of our bank at that time, but that still did not say we agreed to all of this.

The Court: Did not do what?

The Witness: That did not necessarily mean we agreed to the letter that Mr. Weil wrote.

By Mr. Sobeloff:

Q. What is it you say you did not agree to?

Mr. Paisley: Let the witness answer. He makes a statement and you interrupt him.

A. "You strongly indicated that you had serious doubts [fol. 283] as to whether either your bank or the Federal Reserve of Cleveland would be willing to grant such approval." That refers to \$200,000 additional. We were already almost up to \$300,000 and we could not go beyond that without again having the agreement amended, and so forth.

Q. Did your counsel, or did you and Mr. Zurlinden or any of your board who were considering the matter, ever suggest as an alternative that you would extend the limit of capital investment to Triumph if they would take the contract directly?

A. Not in this case. It was never suggested, no. I mean it was never put up to us, therefore we never either suggested we would do it or would not.

Mr. Paisley: What is it now that was not put up to you?

The Witness: Whether or not this company itself, Triumph itself, could take this contract and spend \$200,000.

Mr. Paisley: If the Government were going to advance \$450,000.

The Witness: Yes.

Mr. Paisley: \$200,000 of which could go in capital assets. [fol. 284] You say that proposition was never put up to the bank except in the form of this letter, this letter from Mr. Weil.

The Witness: That is right.

By Mr. Sobeloff:

Q. If the Government had made an advance of \$450,000 and they had expended \$200,000 of it for buildings, and then it repaid the Government, as an advance has to be repaid, the net effect would be, of course, to increase the fixed capital of this company by about \$200,000, would it not?

A. Yes, if we had approved it.

Q. Was that allowed under your agreement, when they had only sixty odd hundred dollars available?

A. No, it would not have been possible.

Q. And if such capital investment was deemed necessary, in order to carry out the contract, could Triumph have carried out the contract under the existing agreement?

A. Not under the existing loan agreement; no.

Mr. Paisley: You mean it would not be possible without having the lawyers draw up an amended loan agreement, is that right?

[fol. 285] The Witness: Article 33 would have had to be changed to permit the increase of capital expenditure.

Mr. Paisley: And that is the way you did it every time they asked you?

The Witness: That is right.

By Mr. Sobeloff:

Q. When you say you did it every time they asked you, you don't mean to imply it was just an automatic, perfunctory thing, that all they had to do was to ask and you would say, Yes?

A. Every time a new loan was granted we would have to review how much money was spent in fixed assets and

figure how much money was needed during the next period of the agreement, then we would take that amount of money which had been spent up to date and figure how much the company needed for additional fixed assets, and include that in Article 33 of the loan agreement.

Q. I understand that. You have made that clear. Now, Mr. Lucas, in this letter of Mr. Weil's, I find this: "In view of the foregoing situation, first, the refusal on the part of the banks to permit Triumph to expend approxi-[fol. 286-287] mately \$200,000 additional for capital assets; second, the threatened loss to Triumph of the four key men so important to its organization, it is proposed to solve the dilemma as follows." You never said to Mr. Weil, did you, you had a different understanding of the position of the banks?

A. There was no need to have a different understanding, because they could only spend \$6200 under the terms of the loan agreement.

Mr. Sobeloff: That is right.

The Court: Is everybody finished with the witness?

Mr. Paisley: Yes, sir.

[fol. 288]

JOHN H. LUCAS

Cross-examination.

By Mr. Sobeloff:

Q. Mr. Lucas, there was some little uncertainty in your mind yesterday about the dates of these agreements. You have had an opportunity now to look over that, and I would like to have you give the accurate date to the jury, if you will, please.

A. I think I inadvertently gave a date with respect to the Supplemental Loan Agreement in which the original Loan Agreement was \$650,000, the first loan agreement, which permitted capital assets up to \$160,000.

[fol. 289] Q. \$160,000 computing from what date to what date?

A. From August 1, 1940 to March 1, 1942.

Q. August 1, 1940 to August 1st?

A. No; it is August, 1940 to March 1, 1942.

Q. What is the date of that agreement?

A. March 11, 1941.

Q. What was the next?

A. The expiration date was March 1, 1942.

Q. What do you mean?

A. The expiration date of the agreement was March 1, 1942.

Then there was a supplemental loan agreement for \$600,000 additional loan. That supplemental agreement was dated August 14, 1941.

Q. What was the limitation on capital expenditures?

A. That increased the loan. May I complete this?

Q. Certainly.

A. That increased the loan from \$600,000 up to \$1,250,000.

The first loan of \$650,000, was to be paid March 1, 1942. The banks had a right to have that loan paid on that date. But the additional \$600,000 was to be paid on or about [fol. 290] September 15, 1942.

The original capital expenditures were increased from \$160,000 to \$240,000.

Q. What period does this cover for the expenditures?

A. September 15, 1942. That is where I made my mistake in the date. I think I said March on yesterday. That should have been September 15, 1942.

Q. What was the beginning date of that period?

A. The beginning date for the expenditures was 8-1-40, or August 1, 1940.

Q. In other words, it was not the date of the original loan?

A. Yes.

Q. The \$240,000 was to include expenditures made prior to this August of 1941, and also those made from August, 1940, the whole year previous?

A. And then on November 28, 1941, we increased, with the permission of the Federal Reserve Bank and our own bank, the capital expenditures up to \$300,000.

Q. To cover what period?

A. From 8-1-40.

[fol. 291] Q. Again from the original beginning date?

A. Yes.

Q. To what time?

A. September 15, 1942.

Q. It has the same duration as the \$240,000?

A. Yes.

Q. Do you recall the circumstances under which that increase from \$240,000 to \$300,000 as the capital expenditures limitation was made?

A. Do you mean why we increased that?

Q. Yes.

A. On November 19, 1941, I was looking over the financial statement of Sabel & Company, the auditors, and I saw that, according to my interpretation, they had gone up to \$245,357.82 in capital expenditures, which was in violation of the loan agreement. So I began to check these figures to see whether or not there was a technical default or a legitimate default on this loan, because under those circumstances the company could not expend more than the loan limitation said without written permission from us.

[fol. 292] So my feeling was that it was a default of the loan. And I called in Mr. Kann and advised him that, in my opinion, this loan was in default technically.

Q. Which Mr. Kann?

A. Mr. G. H. Kann. He explained to me that he understood the loan agreement to mean that the net sum after depreciation was the amount to be taken into consideration rather than the gross sum expended for capital assets.

I called this to the attention of the Federal Reserve Bank of Cleveland, Mr. Zerlinden; and the Federal Reserve Bank said—and I am quoting—“is willing to overlook this technical breach of the contract but insists that we advise the company that the amount of expenditures must be gross and not net after depreciation.

“Mr. Zerlinden will recommend to the Federal Reserve Bank a change in the loan agreement to permit capital expenditures up to \$300,000 gross.

“The company spent \$245,357 last year, and from August 1st to October 14th spent \$25,500, and contemplates the expenditure of \$23,000 more, or a total of \$293,857. [fol. 293] They (meaning the Federal Reserve Bank, are satisfied to make the maximum amount \$300,000, providing they get a written approval from us and providing we advise the company that it was technically in default and that we must insist that they keep within the limitation of \$300,000.”

By Mr. Sobeloff:

Q. What is the date that Mr. Zerlinden told you that?

A. I don't know the date, sir. My memorandum that I dictated after the conversation was November 19, 1941.

Q. Then it was about that time?

A. It was on or about that time. We had had correspondence. If you want me to get it, I can look through my files to get the date when we notified the Federal Reserve and got their approval.

Q. It was between September and November 20th?

A. November.

Q. 1941?

A. What was between then?

[fol. 294] Q. The date that you are looking for?

A. It was on or about November 19th, because that is the date I dictated the memorandum.

Q. That is close enough for my purpose. It was about November 19th?

A. Yes.

Q. And the actual enlargement of that limitation to \$300,000 was made as late as November 28, 1941; is that right?

A. The actual approval was on November 28, 1941.

Mr. Sobeloff: Thank you very much, Mr. Lucas.

Redirect examination.

By Mr. Paisley:

Q. Mr. Lucas, when was the loan agreement? Well, Mr. Lucas, is it a fact that the loan agreement was amended again in March, 1942, authorizing capital expenditures of \$450,000?

Mr. Sobeloff: That was after we were out and there was a new management and the Government had taken over.

The Court: March, 1942?

[fol. 295] Mr. Sobeloff: Oh, was it March, 1942?

The Court: Yes.

Mr. Sobeloff: Pardon me, I thought it was after we were out. Well, I have no objection.

The Witness: Yes, sir; on March 5, 1942, what is known as the second loan agreement was made and entered into, expiring December 31, 1942, for the sum of \$1,250,000.

By Mr. Paisley:

Q. Had the loan then increased?

A. No, sir. Mr. Paisley, that was the combination of the two previous loans, \$650,000 which expired March 1, 1942, and \$600,000 which expired September 15, 1942. We made a new agreement in order to renew the \$650,000 which had originally been made.

Q. Is it a fact that in May, 1942, the agreement was again amended, authorizing capital expenditures of \$650,000?

A. The agreement was not amended, sir. The previous loan was paid in full by the making of what is known as the regulation V Loan with the guarantee of the Federal Reserve Bank as the agent for the United States Navy. The previous loan was liquidated completely.

The third loan agreement was dated May 21, 1942, in the amount of \$2,750,000. That expired June 1, 1943, and the capital expenditures were increased.

The Court: To what figure?

The Witness: \$650,000.

By Mr. Paisley:

Q. Now, Mr. Lucas, you were made president of Triumph after the Navy took over, were you not?

A. Yes, sir.

Q. Temporarily?

A. Yes, sir.

Q. How long did you serve?

A. From about October 22nd until about the middle of January, at which time I took sick.

Q. Did any of these men resign: Prial, Feldman, Deibert, or Willis, Kann, or Decker?

A. From Triumph Explosives?

Q. Yes.

Mr. Sobeloff: What is the difference?

[fol. 297] The Witness: Mr. W. L. Kann, Jr. was never at the plant from the date I went down there. Mr. Prial, Mr. Feldman, Mr. Willis and Mr. Deibert continued on in the employ of the company as long as I was there.

By Mr. Paisley:

Q. Did they turn back any of their stock in the Elk Mills Loading Corporation?

A. Yes, sir; they did.

[fol. 298] By Mr. Sobeloff:

Q. Of course, Mr. Lucas, Mr. Gustav Kann returned no stock, because he had no stock.

A. That is right.

Mr. Sobeloff: That is all.

(Witness excused.)

Mr. Paisley: Do you want Mr. Lucas any longer? He wants to leave.

Mr. Sobeloff: I do not think so. We might need to refer to those letters, although, if you have no objection, we will use our copy. And then, also, Mr. Kann may need some of the letters, and you may make a point about the originals. Mr. Lucas has the originals. If you will leave those papers we will not ask Mr. Lucas to remain. If not, we will ask him to remain.

If you will consent that he leave the papers, or that we may use copies, then it will not be necessary for Mr. Lucas to remain. There are certain papers also and correspondence that passed between him and the other bank that we may want to refer to.

Mr. Paisley: Mr. Lucas simply told me that he had an [fol. 299] important business engagement and would like to go. I would like to accommodate him; but if he will be a necessary witness for either side, I suppose he will have to stay.

Mr. Sobeloff: If you will indulge us for about three minutes perhaps we can agree upon just what papers we want.

The Court: No, we will have to go on with the case.

Call your next witness.

Mr. Paisley: I want to call attention to certain minutes at this time, if Your Honor please. The first one is April 10, 1941.

Mr. Sobeloff: Which company?

Mr. Paisley: The minutes of a Special Meeting of the Board of Directors.

"The following directors were present:

G. H. Kann
J. B. Decker
A. P. Shirley
Van Dyke MacBride
R. V. Criswell

"The matter of an increase in the salary of certain employees of the company as of March 15, 1941, was brought to the attention of the Board. The following is a list showing the amount of the original salaries and the amount of salaries after giving effect to the proposed increases."

There are two columns of figures.

	"Per Annum"	"Per Annum"
"R. V. Criswell	\$7,800	\$9,000
S. M. Feldman	5,200	7,800
W. L. Kann, Jr.	3,720	6,000
T. A. King	3,300	4,000
V. G. Willis	3,000	6,400"

He is another defendant. And I am reading from the minutes of Triumph Explosives, Incorporated.

"The president explained to the Board that the loan agreement between this company and Peoples-Pittsburgh Trust Company and the Federal Reserve Bank of Cleveland provided that no increases of salaries of employees receiving annual salaries of \$3,000 or more should be granted without first obtaining the approval of the said banks. The president further stated that the increases as [fol. 301] shown had been approved by the banks, subject to the approval of the Board of Directors. After thorough discussion, the following resolution was made, seconded and unanimously carried.

"Resolved, that the salaries of the respective employees as appearing on the foregoing list be, and the same are, hereby increased as shown, commencing as of March 15, 1941."

The next minutes are the minutes of the Board of Directors of November 25, 1941, Triumph Explosives, Inc.

"Present:

Gustav H. Kann
William L. Kann
Josef Ben Decker
A. P. Shirley
I. A. Diamondstone
Van Dyke MacBride
R. V. Criswell

constituting the full Board of Directors and a quorum.

"The matter of the salaries of the officers was discussed, and on motion duly made, seconded and unanimously carried, [fol. 302] the following salaries were fixed until further action:

"President, Gustav H. Kann	\$1,050
Executive Vice-President and General Manager, Josef Ben Decker	18,000
Second Vice-President, R. V. Criswell	9,000
Vice-President in Charge of Sales, Roy R. Trempy (Drawing Account)	18,000."

And some other officers who are not involved in this case. Well, I might as well read them.

"Secretary and Treasurer, Wm. L. Kann	\$6,950
Asst. Secretary, Elizabeth Jackson	3,900."

Mr. Sobeloff: What is that figure?

Mr. Paisley: \$6,950.

Mr. Sobeloff: What did you say about it? I did not hear it.

Mr. Paisley: I am reading the minutes. I announced the date. Minutes of the Board of Directors of November 25, 1941.

"The Board was advised of increases in the salaries of employees as follows:

[fol. 303] "John J. Prial	from \$6,400 to \$7,700
Victor G. Willis, Jr.	" 6,400 " 7,700."

Then there are some more who are not involved in this case. Of course, those two men are defendants in this case.

“Upon motion duly made, seconded and unanimously carried, the above salary increases were approved.”

Now the Minutes of January 24, 1942, meeting of the Board.

“Present:

Gustav H. Kann,
Joseph B. Decker,
William L. Kann,
R. V. Criswell.

“A further discussion ensued in regard to the company's policy as to increasing the salaries of any present employees to an amount not to exceed \$7,200, and also in regard to distribution of bonuses to various key employees, the total amount of such bonuses not to exceed during any twelve-month period the sum of \$3,000. Upon motion duly made, seconded and unanimously carried, it was

[fol. 304] “Resolved that no salaries of any present employees receiving annual compensation between the sum of \$3,000 and \$7,200 shall be increased without the joint approval of Mr. G. H. Kann and Mr. J. B. Decker.

“And

“It Is Further Resolved, that no bonuses shall be declared or paid to any employees of the Company without the joint approval of Mr. G. H. Kann and Mr. J. B. Decker.”

Mr. Paisley: All of these minutes that I am reading from are the minutes of Triumph Explosives, Incorporated.

Mr. Sobeloff: Your Honor, there are other parts of the minutes there that, of course, could be deferred until our case is on; but it seems to me only fair that when a particular action is read, the explanation ought to be read.

The Court: No. The Government has the right to develop its own case according to the plan of its counsel. You will have full opportunity to present anything else.

[fol. 305] Mr. Sobeloff: This is in the same minutes on the same matter.

The Court: That may be so.

Mr. Paisley: March 17, 1942, Minutes of the Board of Directors of Triumph.

“Present:

Gustav H. Kann,
Joseph B. Decker,

Colonel A. P. Shirley,
 Van Dyke-MacBride,
 R. V. Criswell

"The bonus payable to the principal officers was discussed in connection with the contracts between the company and Messrs. G. H. Kann, W. L. Kann and J. B. Decker. The Board was advised that the total bonus payable under the contracts, in view of the profits of the Company for the six months period ending January 31, 1942, was \$111,483.27.

"On motion duly made, seconded and unanimously carried, it was:

"Resolved, that the bonus payable to the aforesaid principal officers be set up on the books of the company as follows, [fol. 306] and that payment thereof be subsidiary to the payment of bank indebtedness maturing December 31, 1942:

"J. B. Decker	\$41,741.73
G. H. Kann	29,870.82
W. L. Kann, Sr.	20,870.82
R. V. Criswell	5,000.00
W. L. Kann, Jr.	5,000.00
F. H. Prior	3,000.00
V. G. Willis, Jr.	3,000.00"

The Court: What was that figure for Mr. G. H. Kann?

Mr. Paisley: \$29,870.82.

Mr. Sobeloff: Of course, that was set up as subsidiary, as Your Honor will recall. It was never paid, and subsequently it was cancelled, I understand.

Mr. Paisley: Are you speaking about the bonus paid to Mr. Kann?

Mr. Sobeloff: Yes. That was never paid to Mr. Kann.

Mr. Paisley: How about the others?

[fol. 307] Mr. Sobeloff: Other people mentioned there?

Mr. Paisley: Yes.

Mr. Sobeloff: I don't know. I am commenting only on Mr. Kann. You see, if you just tell one side—

The Court: Now, Mr. Sobeloff, really I must call your attention—

Mr. Sobeloff: I think your Honor is right. I will defer it.

Mr. Paisley: I will read from the Minutes of July 24, 1942.

"Upon the conclusion of this discussion"——

Mr. Sobeloff: What discussion? I have no way of following you, and I am sure the jury can not follow you.

Mr. Paisley: "Mr. Kann then called the Board's attention to the fact that the company's fiscal year ends July 31, 1942, and that in all probability no further Board meeting would be held prior to the end of the company's fiscal year. Mr. Kann stated that while final figures were not available, nevertheless tentative figures had been prepared showing the result of the Company's operations. Mr. Kann there- [fol. 308] upon asked Mr. Becker to produce the tentative report of operations and to explain the same. There followed an extensive discussion in connection with the tentative figures submitted.

"Upon the conclusion of this discussion Mr. Kann called the directors' attention to the fact that upon the basis of the tentative figures submitted under the company's contract and bonus arrangement with the company's three principal officers there would probably be available for bonuses to such officers an amount substantially in excess of \$400,000.

"Mr. Kann also called the Board's attention to the action taken by the directors at their meeting of March 17, 1942, at which time the Board directed that bonuses payable to officers and employees be set up on the books of the company as follows, payment thereof to be subsidiary to the payment of the bank indebtedness maturing December 31, 1942."

Those figures have already been read to you, and I will not read them.

"Mr. Kann further pointed out that since the Board had [fol. 309] taken such action on March 17, 1942, a new loan agreement had been entered into between the company and the bank, extending to the company a line of credit up to \$2,750,000 maturing June 1, 1943, which agreement permits the payment of bonuses during any year to officers and employees other than the three principal officers of the company in a sum not exceeding \$30,000.

"After thorough discussion, on motion duly made, seconded and unanimously carried it was

"Resolved that the action heretofore taken by the Board of Directors at its meeting of March 17, 1942, in connection with setting up on the books of the company bonuses pay-

able to Messrs. J. B. Decker, G. H. Kann, W. L. Kann, Sr., R. V. Criswell, W. L. Kann, Jr., F. H. Prior, V. G. Willis, Jr., and Miss E. E. Jackson, be and the same is hereby rescinded and annulled.

"And be it further resolved, inasmuch as the services rendered by the following named individuals has been of great value to the company, that the following bonuses be paid to them respectively as additional compensation for their services rendered to the company during the fiscal [fol. 310] year ending July 31, 1942:

"Sidney Feldman, Asst. Plant Manager	\$5,000.
E. E. Jackson, Asst. Secretary	3,000.
F. H. Prior, Accountant	3,000.
V. G. Willis, Jr., Pyrotechnic Loading Superintendent	5,000.
John Prial, Ammunition Loading Superintendent	5,000.
W. E. Kann, Jr., Director of Purchases	5,000.
William Vernon, Comptroller	2,000.

"A discussion thereafter ensued in regard to the bonuses which should be declared and set up on the books of the Company payable to the principal officers. While the Board of Directors recognized that under the company's bonus plan and contracts with the principal officers of the company total bonuses could be set up aggregating well in excess of \$400,000, nevertheless, on motion duly made, seconded and unanimously carried it was

"Resolved that bonuses be declared to the principal officers of the company for the fiscal year ending July 31, 1942, and that they be entered on the books of the company as follows:

[fol. 311] "G. H. Kann	\$66,000.
W. L. Kann	60,000.
J. B. Decker	100,000.
R. V. Criswell	5,000.

"There being no further business, on motion the meeting was adjourned."

DAVID W. OLDHAM

Mr. Paisley: In order that the Jury might not be under any misapprehension from what was read, I am willing to

stipulate that on October 1st, at the meeting of the Board of Directors, the bonus that was voted at the meeting, the minutes of which I have read, or those bonuses, were rescinded, and they did not get the bonuses.

Mr. Sobeloff: Even at the meeting at which it was voted, [fol. 312] it was subordinated to the loan.

Mr. Paisley: It was not in the last minutes that I read; it was in the first.

Mr. Sobeloff: I will not debate that now.

Mr. Paisley: Are you willing to stipulate that?

Mr. Sobeloff: Gladly. I think it is only fair that that should be known.

Mr. Paisley: That is the meeting of October 1st.

Mr. Sobeloff: That is right.

Direct examination.

By Mr. Paisley:

Q. Mr. Oldham, will you please state your name and occupation to the jury.

A. My name is David W. Oldham. I am a Special Agent of the Federal Bureau of Investigation.

Q. Mr. Oldham, were you assigned, in the discharge of your official duties to make an investigation of this Triumph Explosives matter?

A. Yes, sir.

Q. When did you commence your work?

[fol. 313] A. I commenced my work two days after the Navy took over the plant, which I believe was on October 14, 1942.

Q. How long were you engaged in the investigation?

A. The major part of our investigation was completed in about March or April, 1943; but there have been some matters coming up continually.

Q. Are you an accountant?

A. Yes; a certified public accountant.

Q. In what state?

A. New York.

Q. In your investigation, did you have access to the books and accounts of Triumph Explosives?

A. Yes.

Q. Did you have access to the books of account of Elk Mills Loading Corporation?

A. Yes.

Q. Did you examine the books?

A. Yes; of Elk Mills Loading Corporation.

Q. Are those books here in Court and available to counsel for both sides?

[fol. 314] A. They are available. They are here.

Q. In this building?

A. Yes.

Q. Did you make any transcript from the books of account of Elk Mills showing the operations of the company?

A. I examined the books of account of Elk Mills Loading Corporation for the portion of the fiscal year ending July 31, 1942, and I have with me a statement of income, profit and loss for that period and the balance sheet for the period ending July 31, 1942, as reflected by the books at that time.

Q. Do you also have a transcript showing the amount of withdrawals by the officers and the other defendants in this case?

A. This transcript is an analysis of the drawings by the officers and consultants who are, with the exception of one, the defendants in this case.

Q. How much money was withdrawn, read it to the jury?

A. This is for the period ending July 31, 1942, and the salary together with bonus which was withdrawn for the [fol. 315] period, April 22, 1942, to July 31, 1942:

R. V. Criswell	\$8,600.
S. M. Feldman	8,000.
G. H. Kann	8,000.
John J. Prial	8,000.
Victor Willis, Jr.	9,000.
A. G. Deibert	8,000.
W. L. Kann, Jr.	8,000.

Joseph B. Decker—the books reflected a withdrawal for salaries and bonus of \$69,000. The difference between that and the withdrawals of the others, which is \$1100, was treated in another fashion.

Q. What do you mean by "treated in another fashion"?

A. The books reflected that that was paid to a Mr. McCreight for landscape work and was subsequently charged back to Decker, although it was in the nature of, or it was drawn at the same time that the \$1100.00 payments were made to all of the others.

The Court: What is the aggregate amount?

The Witness: Of the eight people I mentioned?

The Court: Yes.

[fol. 316] The Witness: \$63,900.

By Mr. Paisley:

Q. What does the profit and loss statement show?

A. The profit and loss statement up to July 31, 1942, shows sales, which were sales to Triumph Explosives, \$602,000.

The expenses for that period are \$321,000. That includes in there \$80,000 which was paid to Triumph Explosives in connection with the fee for watchmen, guard and other services, as brought out in the Minutes at this trial.

That gave a profit, before the withdrawing by the officers and consultants and before income tax, of \$283,000.

And then the withdrawals of the officers and consultants of \$63,900 brought the profit down before income tax to \$219,000.

Q. Did you find that any money had been invested by either of the defendants?

A. The balance sheet at July 31, 1942, reflects actual investments of nothing by the way of invested capital.

[fol. 317] Q. How did the balance sheet read at the end of the period July 31, 1942?

A. The total assets were \$270,000; the liabilities, \$51,000; giving a net worth—again before income tax—of \$219,000. The cash in bank was \$4,000.

The profit of the company, in view of the fact that there was no investment, and also in view of the fact that at this time, after taking depreciation and amortization of the defense facilities, showed that the buildings and machinery were \$195,000, and the land and improvements, not including the cost of the land, \$10,000, which was brought out in the trial, was \$38,000. Therefore, the profits of the company went into fixed assets.

Q. Now, Mr. Oldham, did you read the agreement between the two corporations whereby Triumph agreed to furnish the necessary employees to carry on the work of turning out this incendiary bomb?

A. Yes.

Q. You read that?

A. Yes.

[fol. 318] Q. Whereby Elk Mills agreed to pay Triumph or reimburse Triumph for this labor?

A. Yes.

Q. And office held?

A. Yes.

Q. Tell the jury how they handled that on the books.

A. There were inter-company accounts between Triumph and Elk Mills Loading. Triumph Explosives paid all of the expenditures for Elk Mills Loading. However, I might say this; that they billed those to Elk Mills Loading.

On the other hand, Elk Mills Loading, to offset that account, would bill Triumph for the completed material. And in that way Triumph handled all of the purchases and payroll, and so on, for Elk Mills Loading.

Now, in regard to the 5 cents a bomb for those overhead expenses, that was billed by Triumph to Elk Mills, and it was worked through the inter-company accounts.

Q. How much money in actual—well, I will put it this [fol. 319] way: Did you see the cash receipts book of Elk Mills Loading Corporation?

A. Yes.

Q. How much money was actually received by Elk Mills Loading Corporation, according to its books, from Triumph?

A. I can not give you the actual figure there from memory. The book is available. But the cash transactions by Elk Mills Loading were very few. They received occasionally a \$5,000 or a \$10,000 check so that they could pay the salaries to the consultants. They received the \$40,000 check which was mentioned in the trial. All together I would estimate from my recollection that there were no more than ten or fifteen receipts by Elk Mills.

Q. Aggregating approximately how much?

A. I would just be guessing at that figure.

Q. Well, suppose you get the book. Would it be a fair statement to say that that \$40,000 check which has been introduced in evidence, from Triumph to Elk Mills, was the principal item?

A. That was the largest item and the principal item. [fol. 320] Mr. Paisley: I would like to offer these transcripts in evidence.

(The two transcripts above referred to were marked "Government's Exhibit No. 14.")

By Mr. Paisley:

Q. Now, Mr. Oldham, do you have that letter with you, and do you have that stuff with you this morning?

But before I go into that, would you mind finding that other matter?

A. I can read these here. They are very few. On April 21st they received \$5,000 from Triumph Explosives; \$5,000 on May 14th, 1942.

I will change that. It aggregates \$9,500.

\$5,000 on May 25th.

\$10,000 on June 11th.

\$40,000 on July 6th.

\$5,000 on July 22nd.

That is something like \$74,000.

Q. Are there any entries in the book after October, 1942?

A. I would merely be looking. I did not examine them. I just examined them to July 31st.

[fol. 321] Q. I mean on that page.

A. What date was that?

Q. In October, 1942.

A. Yes; there is a receipt here from Triumph of \$30,000 on October 15th. On October 17th there is another receipt—it does not say from whom—of \$12,062.18.

Q. When did you first see this letter that I now hand you?

A. I first saw this letter in the files of Triumph Explosives in the latter part of 1942, in November or December.

Q. Is that when you were conducting your investigation of these matters?

A. Yes, sir.

Mr. Paisley: I would like to offer this letter in evidence. The Court: If it is not a very long letter. Who signed it, or is it signed by anybody?

Mr. Paisley: It is a letter from Mr. Weid here to Mr. G. H. Kann.

Mr. Sobeloff: There is no objection to that. I am familiar [fol. 322] with that. I have no objection.

Is it just that one letter that you are offering?

Mr. Paisley: That is right.

The Court: What is the date of it?

Mr. Sobeloff: February 11, 1942.

(The letter from Mr. Weil to Mr. G. H. Kann of February 11, 1942, was then marked "Government's Exhibit No. 15.")

Mr. Paisley: I would like to read it to the jury.

Mr. Sobeloff: No objection.

Mr. Paisley: This is a letter from Weil, Christy & Weil, dated February 11, 1942, to Mr. G. H. Kann, care Pittsburgh Crushed Steel Company, 4839 Harrison Street Pittsburgh, Pennsylvania:

"DEAR GUS:

"I have examined the proposed minutes of the first meeting of the Board of Directors of Elk Mills Loading Corporation, and believe that drastic changes should be made. [fol. 323] "In the first place, inasmuch as this corporation is to be a subsidiary of Triumph, I do not recommend the use of a Minute Book containing watermarked and numbered pages. When minute books of this type are employed, it necessitates the writing up and approval of all minutes before the same can be transcribed in the Minute Book as it is exceedingly awkward to be compelled to make subsequent changes.

"Secondly, I do not believe that the resolutions pertaining to the issuance of the stock, as set forth in the proposed minutes, are in accord either with the facts or with the laws of Maryland pertaining to the issuance of stock. As set forth in the redraft of the minutes enclosed herewith, the consideration for the issuance of 45% of the stock of the company is the conveyance, free and clear of all liens and encumbrances, by good and marketable title, of certain property which should be specifically described so that it could be identified. Where property is the consideration for the issuance of stock, it is necessary that the Directors expressly set forth their opinion as to the value of the property. [fol. 324] *Maryland Code, Art. 23, Sec. 47 (1) (3).*

"Also, the consideration for the issuance of the stock to Triumph Explosives is not, as set forth in the original minutes, stock subscriptions, but is the awarding of a con-

tract, under the terms of which contract Triumph is to make certain advance payments against future deliveries. I have tried to set this forth in the proposed redraft, in the form of an offer to be made by the new corporation to Triumph, which offer then should be accepted by Triumph. I do not have sufficient up-to-date information as to the incendiary bomb contract to prepare the proposed offer, and therefore suggest that either the information be furnished me so that such offer may be prepared, or that the offer be prepared at Elkton and sent to me for approval.

"I also believe it highly inadvisable for the new corporation at its first meeting of the Board of Directors and before it has obtained any assets of any kind, either property or contracts or cash (except possibly in only a nominal amount), to employ a president, a vice president, a treasurer, [fol. 325] a controller, a secretary, and three consultants, all at salaries of \$5200 per annum. In other words, as you yourself know by reason of recent experiences with some of your subsidiaries, the taxing authorities have constantly become more vigilant in regard to allowing salaries to be deducted as operating expense. They require not only that such salaries must be fixed by the Board of Directors, but also that they must be reasonable, commensurate with the services rendered, and whenever a situation arises which causes a field agent to believe that the interested parties are attempting to escape taxation through the payment of salaries, thus reducing not only the corporate taxes but likewise the taxes of stockholders who would ordinarily receive such additional funds in the form of dividends, great difficulty is to be expected. In the instant case, little argument could be given to justify the determination of these salaries not only in favor of the ordinary officers of a corporation but also in favor of a controller and three consultants—at a time when the corporation has no assets of any kind.

"Because of the foregoing, I have redrafted the minutes, [fol. 326] trying to indicate why it might be necessary at a later date to employ consultants, and even authorizing their employment. The proposed redraft, however, delays the determination of the amount of the salaries for the regular officers, as well as the consultants, to a later date. In my opinion this date should be at some meeting of the Directors held after the corporation has had the property conveyed to it, has obtained from Triumph a substantial contract

from which substantial returns might be reasonably expected, and after the actual construction of the plant has been commenced. I would also recommend that at such time the Directors authorize the employment of Mr. Criswell as Controller, especially in view of the necessity of keeping accurate records of the respective advances made by Triumph to the company, etc.

"In other words, I would like to receive sufficient information:

"*1st*: To insert a proper description of the property which is to be conveyed to the Elk Mills Loading Corporation;

"*2nd*: Information as to whether a Deed has been [fol. 327] executed and such property actually conveyed to the company, and if not, when this will be done;

"*3rd*: Sufficient information in regard to the incendiary bomb contract so that a proper offer from Elkton Mills to Triumph can be prepared for the performance of such contract, and then in turn a contract actually prepared to be executed by Triumph with Elkton Mills for the performance of the incendiary bomb work.

"Upon receipt of the foregoing information, minutes can then be prepared for another meeting of the Board of Directors, at which time the Chairman will announce to the Board that the previous offer of Elkton Mills to Triumph has been accepted. He will then present to the Board the formal contract between Triumph and Elkton Mills under which Elkton Mills is to perform the work, which contract should then be ratified and approved and the officers authorized to execute the same. The Chairman will then announce to the Directors the employment of the three consultants and their salaries can be fixed. The Chairman can then announce to the Board the necessity of the employment of a Controller in order that the accounts can be properly kept, so that advances for equipment, machinery, materials, etc. [fol. 328] can be properly segregated as well as the advances that may be necessary in the future for working capital and payroll. This salary can likewise then be fixed. At this meeting, I would recommend that the Chairman suggest to the Board that the salaries of the other officers be fixed at a later meeting after further work has been completed on

the erection of the plant and the installation of machinery and equipment. My reason for this suggestion is that I believe there is far less likelihood of an objection from the taxing authorities being raised in regard to all of the stockholders and officers being employed for the self-same salary if it is done in separate meetings rather than if it appeared that the parties got together and all agreed to take out an equal sum, the effect of which would be to reduce the company's taxes and dividends.

"At this subsequent meeting of the Board, accordingly the Chairman could then state that the plant had been completed or was nearing completion, that operations had either commenced, or were shortly to commence, that the preliminary studies indicated that the contract would be profitable [fol. 329] to the company. Thereafter, the Directors could discuss the question of determining the salaries of the remaining officers, namely, the President, Vice President, Secretary and Treasurer, and such salaries could then be fixed.

"I do not know whether the same would be satisfactory or not, and if not satisfactory, this suggestion can be disregarded. However, I believe it would greatly strengthen the entire picture if the President and Vice President would suggest, in order to conserve the company's cash position, to accept a nominal salary of \$100 per month upon the completion of the contract and that then additional compensation would be paid to them in the form of a bonus so as to compensate them for the time and attention that they had given to the affairs of the Company. Such bonus then, at the end of the period, could for example be \$4000 each, which would put them on the same basis of compensation as the other officers. The reason for this suggestion is that in my opinion, not only would it strengthen the picture from the tax viewpoint above referred to, but likewise it would be a greater protection to Messrs. Kann and Decker from the [fol. 330] possibility of any stockholder of Triumph claiming that inasmuch as they were both under contract with Triumph, limiting their compensation stated in such contract in addition to a fixed bonus arrangement, the formation of the subsidiary company was merely a subterfuge to provide them with additional compensation.

"I have also examined the proposed By-Laws of the new corporation, and while said By-laws are entirely proper for

a large public company, it seems to me it would be far better for this subsidiary corporation to have a simpler set of By-laws, permitting more elasticity in operation. I refer, for example, to *Article I, Section 3*, "Notice of Meetings". The proposed By-laws require written or printed notice to all stockholders at least ten days prior to the meeting. I believe the time should be reduced.

"*Article I, Section 7*. For this type of corporation I see no necessity for having the By-laws require that when any meeting of stockholders is convened where voting is by ballot, such voting shall be conducted by two inspectors.

[fol. 331] "*Article III, Section 7*. I see no necessity for prohibiting the adjournment of a Board of Directors' meeting at which a quorum is not present for a period of more than ten days without further notice being sent.

"Under *Article III*, entitled "Officers",—if it is deemed advisable to employ a controller and if, as the By-laws now provide, the duties of all the officers are so meticulously set forth, I believe that a provision should be inserted permitting the Board of Directors to establish the office of controller, and that some statement should be made as to his duties:

"*Article IV*, entitled "Stock", *Section 4*. I do not believe it advisable in a corporation of this type to provide by By-law that the tenth day preceding each dividend-payment date is fixed as the record date for the determination of the stockholders entitled to receive such dividends. It would seem to me that the By-laws could provide that the Board of Directors could fix such dates as they saw fit as the record dates, at the time of the declaration of dividends.

"In conclusion, as to the By-laws of a subsidiary company, [fol. 332] I would favor what is generally regarded or referred to as the short form of By-laws. These are far simpler and permit much greater elasticity and exercise of judgment and discretion on the part of the Board of Directors in the management of the business.

"If the foregoing meets with the approval of yourself and the parties at Elkton, please advise whether you desire me to purchase the Minute Book and draft the minutes in accordance with the above outline, or whether you desire to have this done at Elkton and then submit it to me for approval. In any event, it will be necessary for me to have in detail the information above outlined.

"In order that the foregoing will be more intelligible, I am herewith returning the By-laws and Minutes previously delivered to me.

"Yours very truly,"

[fol. 333] Cross-examination.

By Mr. Sobeloff:

Q. Mr. Oldham, you have had an opportunity to examine the books of Elk Mills and those of Triumph pertaining to Elk Mills. Can you tell us whether, in your opinion, the intercompany accounts were kept accurately?

A. From my examination, the expenses paid by Triumph for Elk Mills were properly billed to Elk Mills, and vice versa. The intercompany accounts always agreed or after adjustments agreed and were in order.

Q. Now, there was some comment yesterday about a check for \$40,000 which was drawn by Triumph in favor of Elk Mills. Was that check just handed over to Elk Mills as a gift or was it treated in a proper way on the books of both companies?

A. The \$40,000 was treated in the same way that all other finances were. The check was given to Elk Mills and they were likewise charged with it.

Q. Is the same thing true also of the money paid for the land, for the acquisition of the land?

[fol. 334] A. The only item which came into the land deal up to July 31st was the \$250,000. That was charged to Elk Mills. That is the first item in the book, as I recall.

Q. Are you familiar with the item at the time of the settlement which I think was not until October, and perhaps your examination did not go that far? Do you know now from the books whether or not that item which was advanced by Triumph was properly charged to Elk Mills?

The Court: Well, now, isn't there a possible fallacy in approaching it that way? From the standpoint of a corporate organization, why was there any reason for Triumph paying for that land and charging Elk Mills for it?

Mr. Sobeloff: Because under the arrangement Triumph was doing the banking for the subsidiary.

The Court: I know, but Triumph—wasn't it contemplated and shown in the letter from Mr. Weil that the proposal

was to issue shares of stock for various so called key men or employes for their contributions to the corporation in the form of land?

Mr. Sobeloff: Your Honor is entirely right, and your Honor will also recall the testimony of Commander Seid-[fol. 335] man that both Mr. Kann and Mr. Weil disapproved of the way it was handled. But the point I am making is that although the land should have been bought by these individuals, and it was not bought by the individuals, and their failure to buy it was the basis of the rescission of their stock and the turning back of the stock to Triumph ultimately at this October 1st meeting, nevertheless, I want to show that on the books of the companies as between themselves, every item that was paid out by Triumph for Elk Mills was properly charged.

The Court: Very well.

Mr. Sobeloff: And, as I understand it, there was a total aggregate advance from time to time in the acquisition of buildings and equipment and machinery of many hundreds of thousands of dollars, which was reduced down to about— I said to the jury in my opening statement around \$60,000 by October, but this gentleman tells me it was even less than that at that time, or by July 31st:

The Witness: I said at the time I was handling the books it was \$48,000 on July 31st, but due to adjustments it has gone up to \$60,000. It did not go the other way.

[fol. 336] Q. Isn't it true—I don't want to go through a long cross-examination—you see what I am trying to develop. Tell the Court and jury if it is true that the advances made by Triumph on behalf of Elk Mills were properly charged to Elk Mills on the books of the two companies.

A. Yes.

Q. And is it also true that in the profit of \$219,000, on which, of course, there would have to be taxes paid, Triumph would be entitled to 55 per cent of that?

A. That is right.

Q. In addition to that ultimate profit, how much did Triumph get as the original contractor on this sub-contract?

A. Do you mind repeating that so I will understand you correctly?

Q. In addition to this ultimate profit of 55 per cent—

A. Do you mean the 10 per cent?

Q. That is right. What did that amount to?
[fol. 337] A. Give me my notes. I have it figured there.

The Court: Do you want those sheets?

The Witness: No, I have my notes. I computed the computation, I think, by arriving at the completed units up to the end of July, and then multiplied that by the 38 cents and taking 10 per cent. That amounted to approximately \$61,000. You might call that the gross income to Triumph, that is not net. They still have their overhead expenses to apply against that. That is their gross income on that contract.

Q. Their own overhead, of course?

A. Yes.

Q. Their own offices and office rent. But the \$61,000 is just 10 per cent of the completed portion of the incendiary bomb contract up to July 31st?

A. That is right.

Q. So Triumph gets that and it would get 55 per cent of the net profits after taxes of the subsidiary?

A. That is right.

Q. I don't suppose you have made any computation on those \$88,000 that was also paid to Triumph by Elk Mills [fol. 338] on the basis of five cents per bomb as reimbursement for watchman service, water, heat, light, office services, and so forth, have you made any analysis that would enable you to say how much, if any, profit they made on that?

The Court: Who made on it?

Mr. Sobeloff: Triumph. In other words—

The Court: Well, it was an estimate of certain expenses, wasn't it?

Mr. Sobeloff: That is right. But, for example—I don't want to testify, but briefly, I can state the point. They arbitrarily or in good faith made an estimate of five cents. We can show it did not amount to five cents a bomb.

The Court: Do you know that or not?

The Witness: Do I know it?

The Court: Yes. The \$80,000 which was paid at the rate of five cents a bomb as an agreement for reimbursement for expenses, did that result in a profit to Triumph or not? In other words, was the \$80,000 less Triumph's expenses in the matter?

[fol. 339] The Witness: I can answer that in this way—

The Court: Well, can you answer it yes or no?

The Witness: I can not answer it, no.

Mr. Sobeloff: All right, then, I won't press that.

Q. There is one other minor thing. This \$12,000 entry that you read, October 17th, \$12,062.18, that is the refund by the five men who got this lumber money, isn't it? It is the exact amount of the lumber money?

A. It is the exact amount. As I stated when I read that over, I made my examination of July 31st, Mr. Paisley asked me to read what was in the book. There is no explanation of it there. The same thing would be an assumption on my part to say whether it was or was not. That line is blank.

Q. That entry is made after the new management was in, wasn't it?

A. That is right.

Q. They took over the 13th, did they not?

The Court: 14th. Anything else?

Mr. Sobeloff: He came the 14th. I think he said it was [fol. 340] two days after that they took over.

The Witness: They took over on the 12th, I think.

FRANK W. FORESTELL,

Direct examination.

By Mr. Paisley:

Q. Mr. Forestell, will you tell the Court and Jury where you live?

A. I live at Elkton, Maryland.

Q. What is your occupation?

A. I am an attorney.

Q. Are you practicing law in Elkton now?

A. Now. I have not practiced since February.

[fol. 341] Q. Are you employed?

A. No.

Q. Were you ever employed by Triumph Explosives Incorporated?

A. Yes.

Q: During what period of time?

A. I was with Triumph from July 19, 1941, through October, 1942.

Q. During that time, were you called upon to organize a corporation known as Elk Mills Loading Corporation?

A. I was.

Q. Who instructed you to draft the necessary incorporation papers?

A. Well, I spoke with Mr. W. L. Kann, Jr.

Mr. Paisley: I will show you the Elk Mills minute book.

The Court: Here it is, Mr. Paisley.

By Mr. Paisley:

Q. I ask you to examine it, please.

The Court: You have seen it before, I imagine.

The Witness: Yes.

[fol. 342] The Court: All right.

By Mr. Paisley:

Q. Well, did you prepare the contents of the book there?

A. No, I did not. I prepared the certificate of incorporation. I drafted a set of by-laws, and I am pretty certain that I prepared the minutes for the organization meeting. But I have no recollection of preparing other minutes than that one meeting that was held, I think, some time in May.

The Court: Have you recently read over the minutes of the organization of the corporation as it appears in that minute book and is it your legal phraseology of what transpired?

The Witness: Your Honor, I have not read the minutes over.

The Court: You don't know, then, whether it is or not. I thought you had read it.

Mr. Paisley: I think I can expedite matters.

Q. I ask you to examine these papers and tell the Court and jury what they are, if you know.

[fol. 343] A. This first group here is the certificate of incorporation, the second group is a set of by-laws, and the third group are the minutes of a meeting of incorporators of the Elk Mills Corporation.

The Court: I notice, as you turn those over, that the last page, as far as I caught it from here, has been signed by somebody in ink.

The Witness: Yes, sir, this one is, your Honor; waiver of notice signed by Miss Bondurant, Robert C. Downey, Jr., and myself.

The Court: They were the incorporators.

The Witness: They were the incorporators.

The Court: Did you say you have among your papers your draft of the organization minutes of the corporation?

The Witness: These are my papers.

The Court: Do they include your draft of the organization meeting?

The Witness: Yes, your Honor.

The Court: Now, hand them to me, will you, please?

(Papers handed to the Court.)

[fol. 344] The Court: They are also signed by Valdah M. Bondurant, secretary of the meeting; Frank W. Forestell, Valdah M. Bondurant, and Robert C. Downey. They merely refer to the certificate of incorporation and end by saying, "There being no other or further business, the same was adjourned." This is the first meeting of the incorporators.

The Witness: That is right, your Honor.

The Court: But when you referred to organization meeting, I had reference, and I suppose you understood I had reference to the organization, whereby the officers were elected and the stock was authorized to be issued and so on.

The Witness: No, I did not prepare them.

[fol. 345] Q. Now, Mr. Forestell, I call your attention to the minutes of first meeting of the board of directors of Elk Mills Loading Corporation. As I understand it, these minutes which you handed to his Honor, and which you say you drew, were minutes at which a board of directors was said to have been elected. Is that right?

The Court: No, Mr. Paisley. If you will look at the paper you will see that it simply accepts the certificate of incorporation.

[fol. 346] The Witness: No, sir.

Mr. Paisley: I am frequently wrong, your Honor, but I am not wrong this time.

The Court: Is there something on the other side of the page that I did not see?

Mr. Paisley: I suppose so.

The Court: All right. Pass it up, then. That is my mistake.

(Paper handed to the Court.)

The Court: I think I have read the whole of this now. It accepts the certificate of incorporation, it adopts by-laws, and it elects directors. It says nothing about salaries for directors and nothing about payments for property by stock.

Mr. Paisley: That is right, your Honor.

The Court: So I would not call that the organization meeting of the corporation, but that may be simply a difference in the terms that different lawyers use.

Mr. Paisley: Yes, sir.

Q. I call your attention to the next meeting of the stockholders or directors or any one appearing in this book, minute book, which is styled, "Minutes of the First Meeting [fol. 347] of the Board of Directors of Elk Mills Loading Corporation", purporting to have been held on January 2, 1942. I will ask you to state whether or not you drew up those minutes?

A. No, I did not draw these.

Mr. Paisley: Your Honor, this letter that was introduced by the witness Oldham is dated February 11, 1942, and it criticises certain minutes which had been drawn of a meeting said to have been held on January 2, 1942, and encloses a redraft of proposed minutes of January 2, 1942, and they are in evidence here, and I would like to offer in evidence—

Mr. Sobeloff: No. I think you are mistaken in that. What Mr. Weil returned was not a redraft but the very papers that were referred to him and criticised. He says in his final paragraph—

The Court: He did not have the information to draw that.

Mr. Sobeloff: Exactly. "In order that the foregoing may be more intelligible, I am herewith returning the by-[fol. 348] laws and minutes previously delivered to me."

Mr. Paisley: At any rate, it is a draft that he is enclosing to Mr. G. H. Kann.

The Court: Presumably, from what I have just heard, the attached papers to the letter are the first draft or *the* draft of the organization meeting which was sent to Mr. Weil by somebody, presumably by Mr. Kann. Is that right?

Mr. Paisley: Yes, sir.

Q. Now, I hand you this paper, which is marked, "Government's Exhibit 15"; tell the Court and jury whether you drafted those papers?

Mr. Sobeloff: What is this you are showing him? The Exhibit 15 is Mr. Weil's letter that was just read.

Mr. Paisley: He says he is returning those proposed drafts.

A. No, sir. I did not draw these.

[fols. 349-350] (Minutes referred to marked and filed in evidence as Government-Exhibit 16.)

[fol. 351]

CROSS-EXAMINATION.

Q. Mr. Forestell, when is the first time that you knew that the Elk Mills Corporation had been formed?

A. Well, I incorporated the company. When I was first approached, I think it was during the latter part of November or early December.

The Court: The certificate is dated December 2nd, as I recall.

Mr. Sobeloff: Yes, it is.

Q. You were one of the incorporators, so you knew at the time, of course?

A. Yes.

Q. And you say you did not draw the minutes pertaining to the issuance of stock?

A. No, I did not.

Q. Do you know whether there was some other lawyer? Did you have negotiations with some other lawyer than Mr. Weil?

A. No. I dealt with Mr. Weil.

The Court: What do you mean by "dealt with Mr. Weil?" When?

The Witness: He was counsel for the company, and, as [fol. 352] near as I can recall, after the corporation was organized and that draft of the minutes that I just reviewed was written up, I lost track or all control of the corporation, I mean as far as minutes and as far as knowing what it was to do, or anything like that.

By Mr. Sobeloff:

Q. The corporation was formed on December 2nd by you. This letter that has been read to the jury, in which Mr. Weil criticizes the draft prepared by some other person, is dated February 11, more than two months later. Do you know of any lawyer or other person who, in the meantime, concerned himself with the corporation affairs or organization of Elk Mills?

A. No, I do not.

Q. When did you reappear in the picture?

A. The next I heard of it was in connection with the purchase of that 55 acres of land.

The Court: If it will help you any, I notice one of these checks, I think the check for \$10,980 or \$10,890, was made payable to Forestell.

The Witness: Yes, that was the consideration that they [fol. 353] paid.

By Mr. Sobeloff:

Q. You handled the real estate transaction?

A. Yes.

Q. In December, 1941, was William L. Kann, Jr., the young man that stood up back there, was he then the director of purchases of Triumph?

A. I don't think so. He was in the purchasing department. I think at that time most of the purchasing was done by Mr. Feldman.

Q. He was working under Feldman?

A. I think he was working under Mr. Feldman.

[fol. 354] Mr. Paisley: We would like to offer in evidence these two agreements whereby the contract was assigned from the Triumph to the Elk Mills on the 4th of January, 1942, and whereby Triumph agrees to furnish the labor, and so forth, necessary to carry out the operations, dated the 17th of March, 1942. Any objection?

Mr. Sobeloff: None at all.

(Papers referred to were thereupon marked and filed in evidence as Government's Exhibit 17 and Government's Exhibit 18, respectively).

Mr. Paisley: Then the Government rests, your Honor.

[fol. 355]

A. LEO WEIL, JR.

Direct examination.

By Mr. Sobeloff:

Q. Mr. Weil, will you tell us your address and your profession?

A. 7721 Frick Building, Pittsburgh, Pa. I am an attorney, member of the firm of Weil, Christie & Weil, practicing law at that address.

Q. How long have you been a member of the bar?

A. Since 1921.

Q. Your firm is counsel for Triumph Explosives?

A. That is correct.

Q. You are also related to Mr. Kann?

A. As a brother-in-law.

[fol. 356] Q. Did you form the Elk Mills Corporation?

A. I did not.

Q. When did you first hear that it had been formed?

A. Shortly after, a few days after December 3, 1941, when Mr. Kann brought to me a memorandum signed or with the name of Sidney M. Feldman attached to it, and which related the situation pertaining to the awarding of an incendiary bomb contract and the formation—

Mr. Paisley: Well, are you going to offer it in evidence?

[fol. 357] A. (Continuing) —of a company.

Mr. Paisley: I was just going to shorten it. If you are going to offer it in evidence, that is the best evidence.

Mr. Sobeloff: I was going to, I was trying to lay the foundation, but if you are willing to admit it, we will offer it.

Mr. Paisley: ~~It saves time.~~

The Court: What is the date of it?

Mr. Sobeloff: It is dated December 3, 1941.

The Court: That is the day after Elk Mills had been formed.

Mr. Sobeloff: That is right.

Q. When were you shown this paper, or the original of which this is a copy?

A. I was shown the paper a few days after December 3rd in Pittsburgh by Mr. Kann, who brought it into my office.

Mr. Sobeloff: In order that the rest may be intelligible, I will offer it now.

Mr. Paisley: No objection.

(Paper referred to marked and filed in evidence as De-[fol. 358] fendant's Exhibit 2).

Q. Will you read this?

The Court: Oh, you read it, Mr. Sobeloff.

Mr. Sobeloff: All right. This paper is dated December 3, 1941, signed S. M. Feldman. It is headed, "Re. Incendiary Bombs."

"When the original inquiry was received from Chemical Warfare Service on incendiary bombs, it was our initial decision not to bid on this product due to large amount of property required, storage problems, supervision, et cetera, and we, therefore, bid a high price, feeling we would not get the contract at that figure. However, after further consideration and discussion between various members of our organization, we requested Mr. Decker to have Triumph bid on this contract on the basis of receiving the contract but after receipt of the contract it would be sublet to a new or another loading company. Triumph would receive the contract and subcontract it to the new company at a figure which would show Triumph a net

profit of ten per cent. On this basis we proceeded with negotiations, and were fortunate to receive letter from [fol. 359] War Department, dated November 27, 1941, for 3,800,000 pieces at 39.78 cents each, or a total of slightly over \$1,500,000. Triumph now has the contract, and a new corporation has been formed, the Elk Mills Loading Corporation. Expenses for the forming of this corporation have been paid by S. M. Feldman and a very desirable location near Elkton, Maryland, has been selected and will be purchased by J. B. Decker. The Elk Mills Loading Corporation is a corporation of authorized capital stock of 7,000 shares. It was the plan that these 7,000 shares would be distributed equally among the key members of the organization of Triumph as a means of their obtaining additional income. The seven members of the corporation would each own 1,000 shares of the Elk Mills Loading Corporation, are G. H. Kann, J. B. Decker, R. V. Criswell, A. G. Deibert, J. J. Prial, V. G. Willis, Jr., and S. M. Feldman. The engineering has already been started and equipment has been purchased for the loading of the ammunition. The plant has been laid out and construction is to start very shortly. Triumph will have absolutely nothing to do with the contract outside of collecting the profit, inasmuch as bonds are not required on high explosives, and operations will be performed far from Triumph's property. This plant will be an independent one in every way in respect to insurance, management, policy, credit, et cetera." At the bottom is S. M. Feldman.

The Court: I don't quite understand by whom that memorandum was prepared. You say, Mr. Wei, it was given you by whom?

The Witness: Mr. Kann, who brought it in the office and said he had just shortly received it, and it was the first he had heard of the situation, and we discussed it.

Q. You were acting as counsel for the company?

A. That is correct.

Q. And he was consulting you?

[fol. 361] A. That is correct.

Q. What did you or Mr. Kann do after he consulted you about this paper?

A. Mr. Kamp, during the time we were discussing the paper, requested me, as counsel for the company, to attend a board meeting at Triumph which was going to be held on the 11th. I say he requested me to come down to Triumph on that occasion and discuss this particular proposed corporation and the proposed stock holdings of it with Mr. Decker and the particular individuals involved, because I had indicated that the directors of Triumph, in my opinion, had no right to own stock in a corporation it was expecting to take a subcontract from. Triumph Explosives, and I, therefore, did proceed.

The Court: Did you make a distinction there, Mr. Weil, between the officers of Triumph owning stock in another company with which they would have a contract and the officers of Triumph being officers of the other company?

The Witness: If the Court please, in my opinion it is illegal under certain situations for officers and directors [fol. 362] of one corporation to own stock and, therefore, have a financial interest in a contract which that corporation is performing.

The Court: I was asking you what is the distinction in your mind between the officers of Triumph having stock in Elk Mills and the officers of Triumph being officers of Elk Mills. Aren't they dealing with themselves, and isn't that the real objection to their having stock? Doesn't the same principle apply?

The Witness: No, your Honor, because in one case the corporation is a subsidiary of the parent, and it is common business practice for the officers of the parent corporation to be officers and directors of the subsidiary, and, as a matter of fact, that is the only manner in which the subsidiary corporation is commonly controlled by the parent corporation.

The Court: But the officers of Triumph had to deal with themselves as officers of Elk Mills, didn't they, in making the contract?

Mr. Sobeloff: That is a common practice, I think, your Honor

[fol. 363] The Court: Very well. Go ahead. You were asked to attend this meeting of, I think you said, December 11th at Elkton.

The Witness: That is correct, your Honor; and Mr. Kann and I proceeded to Elkton on that day. While at

Elkton I discussed the matter first with Mr. J. B. Decker and explained to him, in the presence of Mr. Kann, also, my objections to the particular plan recited in that letter as to both Mr. Kann and Mr. Decker owning stock in this corporation. Mr. Decker then explained that the particular men, whom he referred to as key men, and if I may refer to them as such, were very much interested in this incendiary bomb contract. That for some considerable time they had been dissatisfied as to the compensation which they had been receiving—

[fol. 364] The Court: I think perhaps I can shorten it. Was Mr. Kann present when Mr. Decker made the statement?

The Witness: He was, your Honor.

[fol. 365] The Witness: Mr. Decker explained that these key men had for some time been complaining about the compensation that they had been receiving from Triumph and were very much dissatisfied. He stated that they had originally proposed that three of the key men, Mr. Feldman, Mr. Willis, and Mr. Prial, should form the subsidiary corporation and perform the contract under the incendiary bomb contract through such corporation which they themselves, these three men, were to own. However, that he had disapproved of that plan—

The Court: Did he say why?

The Witness: He said he had disapproved of that plan for the simple reason that it would be forming a new corporation over which Triumph would have no control immediately upon the completion of the subcontract, because the corporation would be entirely owned, controlled and [fol. 366] operated by these three men, and as soon as the particular subcontract was completed there would be an independent corporation owned by them without any control over it by Triumph, and that was why he had proposed including himself and Mr. Kann as stockholders of such corporation.

We likewise discussed the provision of the bank loan agreement in regard to limitation of capital assets, and inquired into the approximate amount of capital expendi-

tures that would be required in order to perform this incendiary bomb contract, and we pointed out to Mr. Decker, Mr. Kann and I, when we heard the figure was one somewhere around \$200,000, that it would be absolutely impossible to obtain approval from the banks for any such increase because of the difficulty which we had just had in getting the then contract increased.

By Mr. Sobeloff:

Q. You mean the capital expenditure limitation?

A. That is right.

The Court: In other words, what was said then was about what was subsequently put in the minutes?

The Witness: Not at that time, your Honor, not at [fol. 367] first.

The Court: I don't quite understand.

The Witness: Because we were just at that time discussing the difficulties, not the solutions, and Mr. Becker was giving Mr. Kann and me the background of the picture, in so far as these younger men were concerned, and the idea they had originally had of the formation of a corporation of their own. Mr. Decker suggested that Mr. Kann and I discuss the matter with the men themselves, and I, accordingly, did discuss the matter with Mr. Feldman, Mr. Prial, Mr. Willis and Mr. W. L. Kann, not with Mr. G. H. Kann. That was quite a lengthy discussion and some of these men were coming in and out from time to time. But at that time Mr. Feldman verified what Mr. Decker had previously told me in connection with this dissatisfaction, or the dissatisfaction of the key men, in regard to their compensation. Mr. Feldman pointed out that they had a particular experience, due to their association with Triumph, which was of tremendous value by reason of war conditions which then existed. He explained that they were actually explosives experts, and there was [fol. 368] tremendous scarcity of explosives experts, men experienced and qualified to do the work that they could do, and who had their knowledge. He maintained that they could earn, by forming or taking connections with other companies, many times what they were then earning from Triumph, and he said that he knew and they knew it was merely a temporary condition created by the war, and he felt that they would not be doing justice to either them-

selves or their families unless they capitalized to some extent upon that advantage which they then held. He went on to say they never expected to be wealthy men, but he did not think they would be doing the right thing for their families if they did not put away, as he put, a nest egg, due to the capacity or earning capacity which they then enjoyed and probably would enjoy as long as the war lasts. I explained to him—

The Court: I do not think it is necessary to go into all your conversations pro and con. You have stated his conversation about it. Was anybody else present?

The Witness: Yes, your Honor. All of these men were from time to time present.

[fol. 369] The Court: Is that about the gist of it?

The Witness: Yes, sir. We also discussed the difficulty—

[fol. 370] Q. Mr. Weil, I think you were telling us when we recessed about the meeting of December 11th. There was a recess of that meeting during the day, was there not, in which you talked to these young men? I think you were telling us about that.

A. Yes.

Q. And then the meeting resumed and took the action that appears in the Minutes?

A. That is correct.

Q. Apart from the discussion there I want you to tell the Court and Jury whether Triumph Explosives was or was not in a position at that time to carry out the contract for [fol. 371] the incendiary bombs.

A. The company definitely was not in a position so to do because of the terms of the bank loan agreement. That is what was causing us such great concern, because it placed the company in a position of being unable, without breaching the bank loan agreement, to carry on that contract and, in turn, placed us in a position—if that was correct—where the company would have to attempt to have that contract canceled and take the chances of being held for substantial damages by the Chemical Warfare Services for failing to produce this material, which Chemical Warfare Services was exceedingly desirous of obtaining.

Q. Under that contract with the Government did the company have a long time in which to begin delivery, or

was it a comparatively short time? Was there hurry about it on the part of the Government?

A. It was a short-term contract, to be completed within a period of twelve months.

[fol. 372] Mr. Sobeloff: Mr. Weil, did you accompany Mr. Kann to the banks or bank, the Peoples-Pittsburgh Bank?

A. The Peoples-Pittsburgh Trust Company.

Q. To the Peoples-Pittsburgh Trust Company, did you?

A. I did.

[fol. 373] Q. And what was the purpose of that visit?

A. To explain to the banks the plan which had been outlined at the meeting of the directors of Triumph on December 11th, and which was only to be followed upon the approval of the banks, or at least, if the banks did not voice their disapproval of it.

Q. The directors did, as the Minutes state, take their action subject to approval by the bank?

A. That is correct.

Q. You went to the bank with Mr. Kann?

A. Yes; to the bank to explain.

Q. When did you go there?

A. On several occasions. The first time we discussed the matter with Mr. Lucas was a few days prior to December 15th, and then again on December 15th when I brought the letter down.

Q. Without going into too much detail, but with enough for the Court and Jury to understand, tell us what you requested and what the position of the bank was.

The Court: Haven't you had that already from the bank man himself? Is it your purpose to controvert that?

[fol. 374] Mr. Sobeloff: I know, Your Honor, but I want to show the utter hopelessness of ever getting a further—

By Mr. Sobeloff:

Q. Tell us about that interview with Mr. Lucas first.

A. We presented the plan to Mr. Lucas and discussed it with him, and he then, on December 15th, called in Mr. Getteford, the Chairman of the Board, and likewise Mr. Miller, Vice-President and Chairman of the Executive Committee. And during the course of the discussion—

[fol. 375] The Court: Now, can't we shorten this and do full justice to you and his testimony in the matter by asking whether the accounting matter as explained by Mr. Lucas was correct?

The Witness: It is correct in substance.

By Mr. Sobeloff:

Q. Is there anything that you have to add to that?

A. Yes. During the course of that discussion they knew perfectly well because of the fact that just a few weeks before when we had exceeded our capital expenditures limitation that under no circumstances would the banks approve the increase in capital expenditures limitation at that time by another \$200,000 to \$250,000.

Q. Was the consent given in late November, just two weeks before this situation?

A. Yes. That agreement was concluded on November 28th.

Q. Was that increase then from \$240,000 capital expenditure limitation to \$300,000 given at a time when you had [fol. 376] already exceeded the \$240,000?

A. Yes; because we were at loggerheads with the bank on the interpretation of that limitation as to whether it was before or after depreciation.

Q. That is how the excess was incurred?

A. Yes.

Q. Was Mr. Zerlinden's attitude gracious and pleasant, or was there quite a row about it?

A. There was quite a row about it. We went to Cleveland, and Mr. Zerlinden stated that in his opinion it was a way to increase the capital expenditures and that the banks did not desire to have so much money placed in capital assets.

Q. I notice that in your letter of November 16th you say to Mr. Lucas: "You will further recall that when the matter was first discussed with you as to obtaining the approval of the banks, which approval is necessary under our loan agreement, for the expenditure by Triumph of approximately \$200,000 additional for land, plant and equipment, you strongly indicated that you had serious doubts as to [fol. 377] whether either your bank or the Federal Reserve

of Cleveland would be willing to grant such approval."

Was that a correct statement?

A. It was.

Q. Was that ever challenged by Mr. Lucas or by anybody else?

A. It was not.

Q. Did he use this letter of yours in the conversations that took place between you and him and Mr. Zerlinden in Cleveland?

A. It was submitted to Mr. Zerlinden by Mr. Lucas and read by Mr. Zerlinden, and then we discussed it.

Q. Was there ever any question by Mr. Zerlinden or Mr. Lucas or anybody else as to the strict accuracy of what you were saying?

A. None whatever.

Q. There is this further statement in your letter:

"In view of the foregoing situation, first, the refusal on the part of the bank to permit Triumph to expend approximately [fol. 378] \$200,000 additional for capital assets."

As to that, did any one, either Mr. Lucas or members of his Board or Mr. Zerlinden or members of the Board or other officials of the Federal Reserve Bank indicate at any time that this was not correct, that they had not refused, but that they would under some circumstances entertain a proposal for increasing the limitation?

A. Definitely not. As a matter of fact, Mr. Zerlinden indicated exactly the contrary at our meeting in Cleveland.

Q. Was it possible for Triumph to carry out this contract without making capital expenditures?

The Court: Does he know that? He was the attorney for the company.

Mr. Sobeloff: Yes, but he knew that situation and was representing them.

The Court: I know, but it is nothing more than his opinion about it.

Mr. Sobeloff: Very well, I can establish that by another witness, Your Honor.

By Mr. Sobeloff:

[fol. 379] Q. Now, I want to ask you about the minutes that have been spoken of here, the redraft of the minutes. Your letter of February 11, 1942, has been read, and in it

you were criticizing a certain draft of minutes which had been sent to you. Do you recall by whom they were sent to you, or who handed them to you, or how you received them?

A. No; I don't recall how I received them. It may have been by mail or it may have been handed to me by Mr. Kann in Pittsburgh.

Q. When you returned, as you say in your letter, the minutes that had been previously delivered to you, did you also make a tentative draft or at least an outline of the minutes according to the ideas suggested in your letter?

A. I did.

Q. Is this your tentative draft with blanks for insertion of certain information?

A. Yes; that is my tentative redraft.

Q. But the draft that you were criticizing and that you were returning is not attached to this paper?

A. No.

[fol. 380] Q. But it was attached at that time?

A. It was at the time.

By Mr. Sobeloff:

Q. Are you familiar with the action of the Board. There [fol. 381] was one bonus there of \$29,000. Were you familiar with that action?

A. Yes.

Q. Was that \$29,000 ever paid Mr. Kann?

A. It was not.

Q. When was that rescinded?

A. That was rescinded at the meeting of the directors on July 24, 1942.

Q. Then there was some minute read about a bonus for a larger amount \$66,000. Pursuant to what was that bonus declared?

A. To the action taken by the Directors at the self-same meeting on July 24th, which, in turn, was again rescinded at the Directors' meeting of October 1st, which fixed the final bonus that was to be payable to the officers for the period.

Q. Was there an employment agreement between the Company and Mr. Kann which stipulated how much the bonus was to be, based upon profits?

A. No employment agreement, but there was a separate bonus arrangement between the Company and the three [fols. 382-383] principal officers.

Q. Was that ever paid?

A. No, sir.

Q. So none of these bonuses was paid?

A. No.

Q. Do you know how much Mr. Kann received from Triumph in bonuses that year?

A. Nothing.

Q. Nothing at all?

A. Nothing.

Q. Do you know how much salary he got that year?

A. \$1,050.

Q. In Elk Mills, if you are sufficiently familiar with that to tell us, how much did he receive in salary and bonus?

A. \$3,033.34 in salary and \$5,000 bonus, total, \$8,033.34.

Q. Now, with regard to this land, did you know that these men were not to pay for the land?

A. No, sir.

[fol. 384] Cross-examination.

By Mr. Paisley:

Q. As to that paper which you identified, which you say Mr. Kann gave you shortly after December 3, 1943, do you know who wrote it?

A. The name S. M. Feldman is on it. Other than that I know nothing about it.

Q. Mr. Kann gave it to you; but where it came from you do not know, except what he told you?

A. Of course not.

Q. What was the arrangement in the first place as to the amount of stock to be held by Mr. Kann and Mr. Decker?

A. As set forth in that letter, there were seven individuals between whom—each one of whom was to receive 1,000 shares, making a total of 7,000.

Q. You say Mr. Decker told you in the presence of Mr. Kann that the reason they wanted the stock was so that they could control the corporation? Is that right?

A. No; that is not entirely correct, Mr. Paisley.

[fol. 385] Q. I understood you to say that.

A. I am sorry.

Q. What did you say?

A. I said that Mr. Decker disapproved of the original idea of a corporation to be owned by three of the key men and that was why he had changed the plan.

Q. Didn't you say that he and Mr. Kann wanted the stock so that they could control the corporation?

Mr. Sobeloff: Oh, no.

The Witness: I never said that he said that, that Mr. Kann wanted stock.

Mr. Sobeloff: No, sir.

By Mr. Paisley:

Q. However, he, Decker, said that he had disapproved of the proposed stock ownership because it would be forming a new corporation over which Triumph would have no control after the completion of the contract?

A. That is correct.

Q. How much stock did Mr. Kann have?

A. None.

Q. It was one-seventh, wasn't it?

[fol. 386] A. I beg your pardon?

Q. Each was to have one-seventh?

A. Mr. Paisley, each was to have one-seventh under the corporation which is referred to in the memorandum of December 3rd.

Q. That is exactly what I am talking about.

A. But that is not what I was referring to in making that statement. I was referring to another corporation which had previously been discussed.

Q. What corporation were you talking about?

A. I don't know. It was a corporation that was to be formed, as I understood it, by three of the key men.

The Court: I think I can help you to bring your mind to just exactly what this witness did say on that point.

He said that Mr. Kann gave him this typewritten memorandum to which you have just referred, which did provide that each of the seven was to have 1/7 of the stock. So the seven would have all of the stock.

Then the witness says that when he came down here to [fol. 387] Elkton on December 14th Mr. Decker explained to him that the plan as outlined in the letter was not the first plan; that the first plan was that Feldman and two

others wanted to organize the company and keep control among themselves, and that he, Decker, had objected to that because the Triumph Officers would have no control over it, and that, therefore, the plan outlined in the letter given to Mr. Weil was substituted for that.

Then Mr. Weil went on to say that he pointed out to him that neither Mr. Kann nor Mr. Decker should have any stock, and Mr. Weil saw no objection to their being officers and apparently receiving salaries and bonuses from the company.

Is that correct?

The Witness: That is correct.

By Mr. Paisley:

Q. And I understood you to say that Mr. Decker gave you as the reason why he and Mr. Kann wanted stock was so that Triumph could control it.

A. You misunderstood me, Mr. Paisley.

Q. What reason did he give you for wanting stock in [fol. 388] the Elk Mills Loading Corporation?

A. None.

Q. Did Mr. Kann give you any?

A. Mr. Kann did not even know about it until he brought it in to me and we discussed it.

Q. You told us that Mr. Kann was present when you were talking to Decker, didn't you?

A. After December 3rd, yes.

Q. How is that?

A. After December 3rd; but not prior to December third.

Q. Was he present when you were talking to Mr. Decker about stock ownership in Elk Mills?

A. Yes; when I pointed out that neither of them should own stock in the corporation.

Q. Was there any reason advanced by either one of them as to why they wanted stock in Elk Mills?

A. Mr. Kann never expressed any statement that he wanted stock, nor did Mr. Decker. Neither of them gave any reason why they wanted stock, nor did they say that they wanted stock.

[fol. 389] Q. Then they were willing for these three men to own all of the stock, were they?

A. No.

Q. What did they want?

A. I am trying to answer your question.

Q. Perhaps I misunderstood you; but I understood you to say that Mr. Decker told you that the reason they proposed that he and Mr. Kann should have stock in Elk Mills was so that Triumph should have some control over the corporation. Is that right?

A. No, sir.

Q. You stated that Triumph could not undertake this incendiary bomb contract, did you not; that it was impossible?

The Witness: Triumph could not have taken the contract [fol. 390] directly without violating the terms of the bank loan agreement.

By Mr. Paisley:

Q. Do you know whether or not Mr. Kann knew about the negotiations leading up to the acquisition of the contract from the Government?

A. I don't think so. I don't know.

Q. You don't know?

A. I don't know.

Q. Did he never tell you?

A. Yes.

Q. What did he tell you then? You said you don't know.

A. I thought you asked me if I knew. The only way I knew that would be from what Mr. Kann told me. Mr. Kann told me that he didn't know anything about the details of the incendiary bomb contract until he received the letter of December 3rd; and then that was amplified by the explanations that we received down at Elkton on December 11th.

Q. Now, Mr. Weil, will you tell the Court and jury, did [fol. 391] you or anyone, so far as you know, at any time put into writing and submit to Peoples-Pittsburgh Trust Company a proposal whereby the loan agreement would be revised and Triumph would be permitted to expend additional capital outlay in order to carry out this incendiary bomb contract?

A. No, sir. So to do would be just a waste of time.

Q. However, every time that Triumph seriously desired to increase salaries or to obtain additional capital outlay it was put in writing, wasn't it?

A. No; that is not correct, Mr. Paisley. Every time there was an increase in the capital expenditure limitation provision of the contract the maturity date or the term of the loan was extended, with the exception of the one time in November, when it was amended because of the fact that under the Bank's interpretation we had already exceeded the limitation.

Q. It is a fact, isn't it, that the only written proposal that was submitted to the bank concerning this financing of this incendiary bomb contract was a proposal as set forth in [fol. 392] your letter which is in evidence here, dated December 15th?

A. That is the letter, yes—December 15th.

Q. You testified, did you not, that the bonus for Mr. Kann and Mr. Decker and others was rescinded at a meeting of the directors on October 1, 1942, didn't you?

A. That is correct.

Q. And you testified that the first bonus voted for officers, Mr. Kann, Mr. Decker and others, was at the March 17, 1942 meeting, didn't you?

A. That is correct. For the six months period, that was.

[fol. 393] —By Mr. Paisley:

Q. You testified concerning the amount of money that Mr. Kann had received from Triumph and Elk Mills, did you not, in salary and bonus?

A. Yes.

Q. As a matter of fact, you know that is not all of the money that Mr. G. H. Kann received from Triumph in this period?

Mr. Sobeloff: I object to that, Your Honor. If he means salary and bonus—Well, I object, Your Honor.

The Court: I think the question is permissible. I don't know what the answer is.

The Witness: The answer is: no, that I don't know it is a fact.

By Mr. Paisley:

Q. How is that?

A. I don't know that it is not a fact, Mr. Paisley.

[fol. 394] Q. Mr. Weil, when Mr. Decker was talking to you in the presence of Mr. Kann along about the middle

of December, when you say you were at Elkton, which one of these men did they say was threatening to leave to capitalize as a result of the war?

A. Nobody was particularly mentioned, nor was it a threat of an immediate leaving at that time. The impression was given that the men had been dissatisfied as to their remuneration.

Q. Did any of them ever threaten to leave in your presence?

A. No, sir.

Q. If they were not given sufficient salaries?

A. No.

Q. Did Mr. Kann, Jr. threaten to leave?

A. No.

Q. He was an expert in munitions making, was he?

A. I can't exactly answer that except to express my opinion that he had learned very considerable about it. Otherwise I don't believe that he would have been able to purchase some four or five thousand items for a plant, Mr. [fol. 395] Paisley, that had contracts totaling some 30 or 40 thousand dollars, without ever permitting a shut-down of any department to occur because of lack of the necessary materials?

Q. You just say that the formation of this corporation was a perfectly legitimate undertaking?

A. Definitely so.

Q. And no fraud about it?

A. Absolutely none.

Q. You were attorney for this company, were you?

A. Our firm and myself, yes. I handled most of the business.

Q. Are you related to Mr. Kann?

A. Yes.

Q. What relation?

A. Brother-in-law.

Q. Did they pay you a regular retainer fee?

A. No; not a regular retainer. We rendered bills from time to time.

Q. Is all your compensation from Mr. Kann fees?

A. Yes.

[fol. 396] Q. Have you ever received any money from Triumph that was charged up to commissions?

A. No, sir.

Q. Do you know of checks of Triumph of some \$40,000, one-thousand-dollar checks totaling \$40,000 paid L. N. Rosenbaum & Sons?

[fol. 397] By Mr. Paisley:

Q. Mr. Weil, isn't it a fact that you received a substantial portion of \$40,000 which was withdrawn from the treasury of Triumph Explosives, Incorporated, through checks to L. M. Rosenbaum and Company, New York, New York, and charged to commissions on the books of account of Triumph Explosives?

Q. I don't know how they were charged. It is a fact that I did receive a portion of the payments that were made by Triumph to L. M. Rosenbaum and Company. As to how they were charged, I don't know.

By Mr. Paisley:

Q. How much of it did you receive?
[fols. 398-400] A. One-third.

[fol. 401] Q. I will ask you this, Mr. Weil, you say, do you not, that you don't know how this \$40,000 was charged up on Triumph's books?

A. That's right.

Q. I ask you if you had ever seen the checks?

A. I doubt if I ever saw the checks themselves/no.

Q. Then you don't know what the legend on the checks is for the purpose for which they were drawn?

The Witness: I know the purposes for which they were drawn, yes.

By Mr. Paisley:

Q. Were they drawn for commissions?

A. They were drawn for payment to L. M. Rosenbaum [fol. 402] and Company under a contract that L. M. Rosenbaum & Co., had with Triumph.

Q. Were they for commissions?

A. No, I don't think they were for commissions, although it was a contract that provided for commissions, but the particular payment there referred to were a retainer under the contract.

Q. Commissions on what?

A. I said they were not commissions. I said they were a retainer under the contract which provided for commissions payable to L. M. Rosenbaum and Company in the event L. M. Rosenbaum and Company obtained business with foreign governments, particularly South American Governments.

Q. Did Mr. Kann know you participated in the \$40,000?

A. Yes, sir.

Mr. Paisley: That is all.

• Redirect examination.

By Mr. Sobeloff:

Q. Was there any irregularity in your taking this one- [fol. 403] third? Mr. Paisley just asked whether you got the money and he dropped it there?

A. None whatever. It was an agreement between L. M. Rosenbaum and Company and myself, which was divulged to my client at the time the agreement was being negotiated, because L. M. Rosenbaum Company and I had had a number of business transactions and under the agreement which existed between us, I was to share in one-third of the compensation which L. M. Rosenbaum and Company was to receive under these several three or four transactions and that was divulged to my client, Triumph Explosives, before Triumph entered into this contract with L. M. Rosenbaum and Company.

Q. And did you represent L. M. Rosenbaum professionally?

A. I did in a number of transactions.

Q. With other companies, too?

A. But in this particular transaction I was in a position where I was both representing them and representing Triumph to the knowledge of both parties.

Q. Which is perfectly ethical and proper?

[fol. 404] A. If both parties are fully informed.

Q. Were they fully informed?

A. Yes.

GUSTAV H. KANN

Direct examination.

By Mr. Sobeloff:

Q. Mr. Kann, you live in Pittsburgh?

A. Yes, sir.

Q. What business are you in there?

A. I am in the manufacture of iron and steel abrasives.

Q. Iron and steel abrasives?

[fol. 405] A. Yes.

Q. What is the name of your company?

A. Pittsburgh Crush Steel Company.

Q. You have also been president of Triumph Explosives until about a year ago?

A. Yes, sir.

Q. I want you to tell us when you first heard of the formation of the Elk Mills or the proposed formation of Elk Mills Corporation?

A. It is a little difficult to answer it that way, because there were two or three discussions about several corporations. As to the Elk Mills Corporation under that name itself I did not learn of that until early in December, but I knew there was some talk of a separate corporation for doing certain work in or near Elkton prior to that time.

Q. Did you receive this memorandum signed by Mr. S. M. Feldman that was testified to here?

A. Yes, I have the original copy.

Q. When and where and from whom did you get that?

A. As near as I can recollect, it was delivered to me in [fol. 406] Elkton, Maryland, on or about December 3rd.

Q. By whom?

A. That, I am not sure.

Q. You don't remember whether Mr. Feldman or someone else handed it to you?

A. I can't remember that.

Q. You remember the recital in that memorandum about your giving some stock, that you were to get some stock?

A. Yes, sir.

Q. Had you made any arrangement to get stock in that company?

A. No, sir, none whatever.

Q. What did you do when you received this memorandum?

A. When I received the memorandum, which for the first time divulged to me that Mr. Decker and I were to be on the stock; I took this memorandum back to Pittsburgh and discussed the matter with Mr. Weil in order to get a proper view of just how to handle this entire arrangement.

Q. Well, did you know before you got this memorandum, [fol. 407] that the company had been formed and that Mr. Feldman had paid for forming it?

A. No, sir, I didn't know that the company had been formed or that Mr. Feldman had paid for it until I got this memorandum. I just want to qualify that. I did know there was talk of a corporation.

Q. Well, now, this memorandum of letter says that the engineering for this company had already been started, equipment has been started for the loading of the ammunition, plant laid out and plans for construction very shortly. Did you know that this has been done?

A. All that progress, no, sir.

Q. Before December 3rd?

A. Not as to progress of the contract, no, sir.

Q. Mr. Weil already testified about the advice he gave you as to your holding stock. I won't go into that. He did give you that advice?

A. Yes.

Q. What did you do?

A. I arranged to have a meeting, first I discussed the matter, talked with Mr. Weil and then suggested that he [fol. 408] come to Elkton, Maryland, with me to explain to the Board of Directors and these key men who were so indispensable to the company the proper plan of handling the entire matter. I was very much concerned about these men. They were dissatisfied and overworked and due to their dissatisfaction, I was afraid we were going to lose them and I even felt they were losing some of their efficiency, because men, when they are not satisfied, can't work, don't use their brains to the best of advantage, and these men were dissatisfied and I wanted to work out some plan which would give them additional compensation.

Q. Had these men been with the company for some time?

A. Practically all of these men had been with that com-

pany since its inception, they had grown up with the company, and the only men upon whom we were dependent for outside factory work.

Q. Had the business expanded in the meantime?

A. This company started, I think, in 1932 or 1933 and expanded from a business of some \$200,000 per year and at that time we were doing at the rate of \$14,000,000 a [fol. 409] year.

Q. And accelerating very rapidly?

A. Yes, sir, very rapidly.

Q. When you got to Elkton and had this meeting, will you tell us the reasons why you sanctioned the subcontracting of this incendiary bomb contract to the Elk Mills Corporation?

A. I will have to go back just a little before that. There was some discussion about this contract some time prior to when it was awarded and it was decided that Triumph should not take the contract.

Q. For what reasons, Mr. Kann?

A. Because we had too much plant and we couldn't expand. We were not in a position to expand our plant to any considerable extent. We had future contracts which required expansion that we have to do first and we felt that we were bound to take this contract, that the Chemical Warfare Service was after anybody in our particular line, which was very limited, to make this very hazardous item and we felt that for National Defense it was our job to take this contract in some manner or means.

[fol. 410] Q. Could Triumph have taken this contract, or, if it was awarded, as I believe it was on November 27th, could it have carried out that contract?

A. No, it would not have carried out that contract.

Q. Why?

A. Because it was in no position to expand plant facilities. It was unable to expand or spend more money on fixed assets.

Q. Under the agreement?

A. Under the loan agreement with the bank, which was a very, very difficult thing to overcome with the bank. On every trip to Elkton I cautioned everybody that was responsible for plant expansion to keep within the limits. I had very bitter arguments with Mr. Lucas and other officials of his bank; with Mr. Zerlinden, and I knew there was no possible way to get the additional money from the bank for

that job. In fact, these discussions with the bank were very unpleasant and, as has been explained before, we had, through the misinterpretation of the loan agreement, ex-[fol. 411] ceeded our capital expenditures limit by some twenty or thirty thousand dollars and when I went to Cleveland to get that straightened out, Mr. Zerlinden particularly and Mr. Southworth, the attorney for the Federal Reserve Bank, told us we had to watch our step—those are just about the words they used—that they did not want their money jeopardized by investing all our income or profits into fixed assets, and we would have therefore been unable to reduce our bank loan.

Q. You had just gone through a negotiation with the bank to get the limitation increase from \$240,000 to \$300,000?

A. Yes, Sir. When we went through those negotiations, we had already exceeded the limit by forty or fifty thousand dollars because we took net increase instead of gross, by gross, I mean before depreciation and not after depreciation. In a year's time or six month's time, a plant of that size could have depreciation of many thousands of dollars and in that particular meeting, we had several meetings, several trips to Cleveland, in order to have the bank agree that we did not violate the contract and Mr. Lucas explained yesterday and read from his memorandum, they [fol. 412] considered it only a technical violation, it was then increased to \$300,000, which allowed us about \$6,000 or \$6200 for January, February, a little over three months, and I knew we couldn't get through on that at that time.

Q. Did you have any other contracts that would require some equipment and buildings and possibly machinery?

A. Yes, at that time we had something in the neighborhood of \$38,000,000 of contracts. \$25,000,000 of those contracts was for forty millimeter shells and facilities for that contract were provided by the United States Navy. In all the other contracts, however, we had to provide the facilities and we were pressed for increased deliveries and every time we had to meet increased deliveries we had to put some additional equipment in and a good bit of it we put in ourselves, but nevertheless, we had to make a capital investment. In fact, later on, money that should be charged to capital was charged to expenses, which should have been not done, which brought that again above the limit.

Q. Then it is obvious that you did not have the capital investment to go on with this contract?

[fol. 413] A. We could not have gone on, we did not have it.

Q. I ask you again to turn to the possibility of getting an increase. You had just completed the transaction with the bank to increase it from \$240,000 to \$300,000—I am talking about the capital limitation?

A. Yes.

Q. On November 28th, a few weeks before?

A. Yes, just prior to that.

Q. Was there any possibility of getting an immediate increase to take care of \$200,000 more of capital investment as was estimated would be needed for execution of this incendiary contract?

A. I was convinced we could not get \$25,000, let alone \$200,000. We were in bad with the bank because we had exceeded and they did not want us to put our money in plant expansion.

Q. I want you to explain to the Court and jury the influence upon that, if it had any influence, of the Government's willingness to advance part of the purchase price in order to enable the company to execute the contract. Would [fol. 414] that have been possible without at the same time increasing the capital investment in violation of the agreement with the bank?

A. No, sir. If the United States Government had advanced us any money on the contract and we would have used any part of that money for plant expansion and would have charged that, as we had to do, the capital assets, and if such additional charge had gone beyond our limits in the amount allowed by the bank, we would have been in violation of the bank contract.

Q. You say that was one of the reasons then for having a sub-contract?

A. Yes, sir.

Q. It has been pointed out here that under the plan, as changed, you were to get no stock?

A. That's right.

Q. Nor was Mr. Decker to get any stock?

A. That's right.

Q. And Triumph was to have fifty-five per cent of the stock and certain men referred to here as key men were to have forty-five per cent?

[fol. 415] A. That's right.

Q. By the way, your nephew, William L. Kann, Jr., was to get only five per cent?

A. Yes.

Q. And the other four were to get ten per cent?

A. Yes.

Q. And in this original plan, your nephew, Mr. William L. Kann, Jr. does not appear at all?

A. He was not in the picture at that time.

The Court: Was W. L. Kann, Jr., an officer of Triumph?

The Witness: No, sir, he was director of purchases.

Mr. Sobeloff: An employee but not an officer.

The Court: Mr. Sobeloff, I thought he signed some of those checks?

Mr. Sobeloff: W. L. Kann, Sr. was an officer of Triumph.

The Court: Is there a W. L. Kann, Sr. as well as junior?

Mr. Sobeloff: Yes, you may have heard that name and [fol. 416] not realized there was a different man.

The Court: Very well.

By Mr. Sobeloff:

Q. What was to be the consideration for the issuance of this 45% of the stock?

A. You mean to the several men?

Q. Yes.

A. They were to deliver to Elk Mills Loading Corporation land of sufficient size to erect this plant free and clear of all encumbrances, they were to pay for the land.

Q. At the time that they were getting 45% of the stock of this company, was there any certainty as to how much that would be worth and whether it would be worth anything? What was the situation, how did it appear at that time in December, 1941?

A. Well, as I recall, the first place they were going to build this plant, which was the earlier idea of the corporation was some few miles out of Elkton, and I think that piece of property was about twenty acres and I am not sure of the price but I think it was around ten or twenty [fol. 417] thousand dollars, I don't know.

Q. Did you know of the change from that location, the more distant location, to the one adjoining Triumph? Did you know when they made a switch?

A. I think in December. That is confused in my mind when they made the switch, but I think it must have been in December.

Q. I was asking you about the prospects of large profits or not in this, or the certainty of large profits in this 45% of the stock that the men were to get for the land?

A. I misunderstood you. At that time it was very difficult for us to know whether there would be large profits or any profits. It was an entirely new item as far as Triumph was concerned. It never made the item before and had to devise ways and means of producing it and it was just questionable what the profit would be, if any.

Q. Who had the problem if any, of working out the technique of manufacturing machinery to permit manufacture and doing all the engineering in connection with that?

[fol. 418] A. I think that work might have been equally divided among the five men who got the stock, but I think one or two of them later on were responsible for producing a very novel idea of loading and assembling incendiary bombs which revolutionized the production of that product in the United States. The Elk Mills Loading Company plant is considered and was considered, when I was there, a model plant for the production of incendiary bombs.

Q. Who had that problem of creating this model plant and dealing with this new problem?

A. I would say the plant construction was probably Mr. — you are talking about the equipment? I would think Mr. Prial was probably the man who developed this idea of gang loading, which was something entirely new.

Q. What was the work that was done there by Mr. Feldman and Mr. Deibert and your nephew? Give us in a general way, I am not going into too much detail, some notion of what they were doing?

A. Mr. Deibert was the maintenance and construction man; Mr. Feldman was in charge of our production; Mr. Willis was the pyrotechnics man who had to do with the very dangerous explosives and ingredients used in these [fol. 419] bombs and Mr. Prial was the technical expert and Mr. W. L. Kann, Jr., was to do the purchasing and look after the office work of the company and expedite the delivery of material.

Q. At that time, you say there was nobody knew whether this would be a profitable contract or not?

A. That's correct, that was wholly a guess when they possibly figured. I had nothing to do with figuring the cost but I know when that idea was new, it was wholly a rough guess.

Q. And the technique finally adopted was devised by these men?

A. Yes, and it is the finest in the country.

Q. We have been told by you and other witnesses that these men were to supply the land upon which the buildings were to be put?

A. Yes.

Q. They did not supply the land, they didn't pay for the land?

A. So I learned later.

Q. When did you first learn of that?

[fol. 420] A. I first learned, of that at the time Commander Seidman was in Elkton during the investigation which he spoke about, Mr. Sabel informed me.

Q. Mr. Sabel was the company's auditor?

A. He was the company's auditor.

Q. He is here in Court?

A. Yes, he is here in Court.

Q. He has been summoned here by the Government. Stand up here, Mr. Sabel. That is the gentleman you are speaking of?

A. Yes.

Q. What did he inform you of?

A. He informed me that these men had come to him some time or other, I am not sure of the time, and told him that they had made this lumber deal about which there has been some talk in this case and when Commander Seidman asked me about it, I then knew about it. That was probably some time in August or September of 1942.

Q. You are answering me about the lumber deal, which is what I want to know, but I want to know about the land itself, why that wasn't paid for by them or did you know [fol. 421] they were not paying for it? Tell us about that?

A. I knew they were to pay for it and repeatedly on my trip to Elkton I went to these men and asked if they had paid for this land and they informed me from time to time that they were ready to pay for the land but were unable to do so because it was not possible to get a clear

title to this property and that they had made an attempt or two attempts to pay for it, but were unable to do so because the land could not be delivered in proper form.

Q. Of course, you were not there all the time?

A. No, sir, I was only there on periodical visits.

Q. Do you know whether or not there is a fact there was some difficulty about the title and that the settlement was delayed until October?

A. Yes, sir, I do know that.

Q. It has also been pointed out here that the Triumph Company advanced certain items for Elk Mills. Tell us whether there was any arrangement with regard to that?

A. Do you mean any arrangement between Triumph and Elk Mills?

[fol. 422] Q. You mean on the sub-contract?

A. Yes, is that what you are referring to?

A. Yes.

A. Triumph was supposed to advance all necessary financing for the completion of this job and it was handled in this way: Triumph would purchase such equipment and parts or supply that were necessary and pay for them or—I don't know if they paid for them, but they were—I don't know whether—

Q. Either pay for them or obligate themselves to pay for them?

A. Yes, they were always charged to Elk Mills. Loading.

Q. And as far as you know, were the records kept in a proper and honest way?

A. Yes, as far as I know. I never examined the record, but as far as I know.

Q. Some criticism has been made here also of the fact that the \$40,000 was advanced by the Triumph to Elk Mills. Do you know how that was handled?

A. That was handled by check, paid to the company's [fol. 423] treasury.

Q. Was that charged to Elk Mills?

A. Yes, it was charged to Elk Mills.

Q. Without trying to be precise to the penny, can you give the jury an idea of the moneys advanced by Triumph to Elk Mills and the amount of repayments?

A. If you want it in the form of cash or the total charges to Elk Mills—

Q. Both, whatever way you have of answering that so the jury may know the situation?

Mr. Paisley: I think the best evidence is the account. They are in evidence here.

Mr. Sobeloff: I see no objection to this man giving the jury a presentation of the thing.

The Court: He can answer it briefly. If it contradicts the account—

Mr. Sobeloff: No, it doesn't contradict the account. The Government man said substantially the same thing. I wanted the jury to have it from a layman's statement rather than a technical standpoint.

The Witness: I am not sure of the amount, I have no [fol. 424] records or notes ahead of me and I can't remember figures but I know there was some eighty or ninety thousand dollars cash advanced and Triumph charged for equipment and lumber and various other charges just like insurance and watchman service and various utilities. I think the total amount amounted in excess of \$550,000.

Q. And at the time you resigned as president of the company, what was the state of that account?

A. At the time I resigned, that picture was even far better than even the figure I gave you as of July 1st. I don't know the figure at the time I resigned but I know Triumph, as I was informed, was indebted to Elk Mills but I have never seen any of those figures.

Q. Was this a profitable adventure for Triumph?

A. Yes, I considered it a very profitable venture.

Q. Without going into detail now, what did it get? It got the ten per cent, did it not?

A. Yes, sir, some sixty odd thousand dollars.

Q. It would be or was entitled to 55% of the profits?

A. Yes.

[fol. 425] Q. How much would that amount to?

A. It was figured the profits after taxes to Elk Mills for that period, as I have recently learned, were \$74,000, I believe, and Triumph would have been entitled to about \$40,000 on that. That is net after taxes.

Q. What was it before taxes?

A. In excess of \$200,000.

Q. Those are the substantial figures we have heard here?

A. Yes.

Q. What else in addition to that Triumph derived as benefits from Elk Mills?

A. Triumph received from Elk Mills five cents per bomb for watchman service, utilities, office rent and any secretarial expense of that kind.

Q. How did that arrangement happen to be made? It was not included in the original sub-contract?

A. It was not originally included, it was too difficult to separate these items with any degree of accuracy, what should be properly chargeable to Elk Mills, but it was agreed five cents should be charged.

[fol. 426] Q. That five cents was arrived at by some division, three cents being for one reason and two cents for another?

A. That wasn't done until later.

Q. On the books?

A. On the books, the whole thing was lumped together at five cents apiece, and that amounted to some eighty odd thousand dollars.

Q. Was it sufficient or insufficient to compensate Triumph fully?

A. I would say that they ought to have eighty thousand dollars and Triumph profited to the extent of forty or fifty thousand dollars.

Q. You started to answer me about this lumber deal. When did you learn about that for the first time?

A. Some time after Commander Seidman appeared in Elkton, which was the latter part of August, 1942.

Q. Now, the checks that was—

The Court: From whom did you learn about it, Mr. Kann, Mr. Seidman or somebody else first?

The Witness: No, I learned from Mr. Sabel.

[fol. 427] By Mr. Sobeloff:

Q. If there is no objection, if you know, what date was that, about?

A. That was some time after August 17th, I don't know, I was there so often.

Q. Commander Seidman testified that the meeting in Washington was on the 21st of August?

A. And he came to Elkton on August 27th, so it was some time after August 27th.

Q. The testimony here shows that the check for the \$12,000 was received by these men, I think, in July, it was some time earlier, wasn't it, it was one of the exhibits here?

The Court: July 22nd, is my recollection of it, or June, I am not sure which.

Mr. Sobeloff: I think it is July, your Honor.

By Mr. Sobeloff:

Q. Did you know of it at the time?

A. No, sir.

Q. Mr. Jackson, on the stand here yesterday, testified to some brief meeting in the corridor between you and your [fol. 428] nephew, in which he said something about paying a bill or lumber bill?

A. Yes, sir.

Q. And that he said it happened on the day that he got his check?

A. Yes, sir.

Q. The check was dated the 21st and his bill, which the check was intended to pay, was dated the following day instead of earlier, the 22nd?

A. Yes.

Q. First of all, tell me, did you or did you not have such—do you recall such a conversation with your nephew?

A. No, sir, I never, I can't recall of ever having any such conversation with my nephew.

Q. Of course, he said it was only that single sentence spoken and you answered "Well, I don't see why not." Do you recall anything of that?

A. No, sir, I don't recall nor was I in Elkton on July 21st or July 22nd.

Q. What is the first consciousness you had then of this [fol. 429] thing?

A. When I was informed immediately after August 27th.

Q. By Mr. Sabel?

A. Yes.

Q. Have you since yesterday, when Mr. Jackson testified, made any effort to establish where you were on July 22nd?

A. Yes, sir.

[fol. 430] Q. You telephoned, did you not, to your office in Pittsburgh?

A. Yes, sir.

Q. And they sent you certain papers?

A. Yes, sir.

Q. And they came in an envelope, which was not opened until this morning by me, in the presence of Mr. Paisley; is that correct?

A. That is correct, sir.

Q. And these are the papers?

A. Yes, sir.

Q. What do they show with respect to your whereabouts on July 22nd?

Mr. Paisley: Well, now, if your Honor please, counsel knows better than that. I object.

The Court: I sustain the objection. The question is not in proper form.

By Mr. Sobeloff:

Q. Well, I will ask you this. You say that you were not in Elkton on the 22nd?

[fol. 431] A. Yes, sir.

Q. Have you any paper here to refresh your recollection?

A. Yes, sir.

Q. Are they the ~~papers~~ that I just mentioned that came to you in this morning's mail?

A. Yes, sir. These are the papers.

Mr. Sobeloff: I am not going to offer those papers. I am going to say Mr. Paisley has seen them. I don't know how closely he has examined them, but he is entirely welcome to see them. Otherwise, I won't go further into that matter.

Q. You say that confirms your recollection that you were not in Elkton on that date?

A. Yes, sir.

Mr. Paisley: I object to that, if your Honor please. I have no objection to his trying to refresh his recollection where he was on July 22nd, any paper that he says will help him to refresh his recollection, but for him to say it confirms his recollection, that is not correct.

The Court: Yes. That is not a correct summary of it.

[fol. 432] By Mr. Sobeloff:

Q. Well, it refreshes your recollection instead of confirmed?

A. It shows I wrote letters in Pittsburgh on July 21st and July 22nd.

Q. Both days?

A. Both days.

Q. Now, just put that aside. And that you were not in Elkton any part of either of those two days?

A. No, sir.

Q. When you heard of this timber deal, this lumber deal, what did you do about it?

A. I immediately spoke to these men about it. They immediately realized that they had made an error and I requested that they return the money to the company, which they immediately agreed to do. There was no trouble at all about it.

Q. Some of them, in fact, did it immediately, and all did it ultimately?

A. They all did it ultimately.

Q. All of that has been paid back?

[fol. 433] A. Yes, sir.

Q. Was Mr. Jackson—I think he has testified here he was the contractor who put up other buildings, too, for Triumph?

A. Oh, I knew that Mr. Jackson did considerable work for Triumph.

Q. Did considerable work for them and many of those buildings were wooden buildings, there was a good deal of lumber put in?

A. Many of them.

Q. And even this particular construction for Elk Mills, was or was not lumber bought on the outside?

A. As I understand, lumber was bought on the outside.

Q. Even if you were told the word "lumber", or paying a lumber bill, would there be anything about that to indicate to your mind that it was a part of some plan of these young men to keep the money?

A. No, sir, we were buying lumber all the time.

Q. Now, I want to ask you briefly with respect to the meeting, I think it was March 17th, in which certain bonuses were voted, and then the meeting of October 7th, [fol. 434] at which Mr. MacBride and Colonel Shirley

asked that an amendment be made in the minutes of March 17th. Had they attended meetings in the meantime?

A. Well, they attended meetings very irregularly, and very infrequently. We had to force them to come when we did get them to come. I don't know whether they attended, without looking at the minutes. I don't think they had. I think they were at one meeting or the other.

Q. Was there any attempt to conceal from them this Elk Mills arrangement?

A. No, sir; none whatever.

Q. As a matter of fact, the name, Elk Mills Corporation, did it appear on the door of the main office?

A. Yes, sir. The name of Elk Mills Loading Company was on the door of one of the offices in the main corridor of the offices of Triumph Explosives, and everybody could see it as they passed.

Q. Would you, without trying to be exact about the dates, tell us when that was put up there and how long it remained there?

A. It was put there in the early part of 1942, as near [fol. 435] as I can recollect, and it was there always when I was there. I imagine it is still there.

Q. And it was not until October, when there was some trouble about the Elk Mills, that these directors wanted to make it appear on the minutes that they did not know about it?

A. That is correct.

Q. There has been some mention here about the increasing of Mr. Willis' salary?

A. Yes, sir.

Q. When was that done?

A. It was done prior to the date of that meeting.

Q. It was already in effect, then, when you learned of it?

[fol. 436] A. Yes, sir.

Q. Well, you did vote for it?

A. I approved it, so the minutes say. We never had a formal meeting.

Q. Did you feel that he was entitled to it or not?

A. Yes, sir. I think Mr. Prial was entitled to every cent he got.

Q. I am talking about Willis.

A. I beg your pardon, Mr. Willis.

Q. Without going into great detail, what was it that he was doing which seemed to your judgment to merit the salary that had been put into effect before it was submitted to you?

The Court: Do you mean this \$9,000, or something like that?

Mr. Sobeloff: No. He was getting \$5200 and it was increased to \$10,400.

The Court: Isn't that a matter for the judgment of the directors of the company?

Mr. Sobeloff: Of course, it is. All of these things are, as we contend.

[fol. 437] The Court: The Government is not complaining about that, as far as I understand.

Mr. Sobeloff: I am sure the jury must have gotten a different impression the way it was presented. All right. If your Honor has made it clear, I am very grateful, and I won't go into that.

Q. Now, I want to ask you about your own compensation and bonus from Elk Mills Corporation. How much have you received from Elk Mills?

A. \$8,033.34.

Q. Divided how?

A. \$3,000 and the odd dollars in salary and \$5,000 in bonus.

Q. Do you feel you justly earned that?

A. Yes, sir, I do.

Q. Will you explain to the jury briefly what services you performed for Elk Mills?

A. My services in connection with Elk Mills was in connection with the administration matters, but the main services that I did in connection with that concern were to attempt to borrow money and put that concern in its own [fol. 438] financial—to put it on its own credit standing. I first discussed the manner of the loan early in January of 1942 with Mr. Lucas, who felt they should have no interest in it inasmuch as they had all they wanted of Triumph. For a number of years we had done considerable business with Brown Brothers and Harriman Company, a banking company of Philadelphia. When I say "we" I mean Triumph Explosives, Incorporated, and Triumph Fusees and Fireworks Company. Brown Brothers and Harriman Company were very anxious to get a portion

of the Triumph business, and Mr. Cook, one of their vice-presidents called on me repeatedly at Pittsburgh to see if he could not get some of our business. I explained to him under the terms of our agreement we could not borrow without the People's-Pittsburgh Trust Company's permission, and even Mr. Cook went there and could not get a participation in the loan.

The Court: Would it not be sufficient to say that he did secure banking accommodations for the Elk Mills and to what extent?

Mr. Sobeloff: I did not want him to go into details, I just wanted the circumstances.

[fol. 439] The Court: Won't you get him to give the substance of it without my reminding you?

Mr. Sobeloff: I think he has told us enough to cover that subject.

The Witness: I don't want your Honor to understand that I did secure accommodations. I did not.

The Court: You did not?

The Witness: No, sir. After repeated efforts we did not.

The Court: You tried to?

The Witness: Yes, sir.

By Mr. Sobeloff:

Q. Is there anything else you want to add to that?

A. No. That and the administration matters.

Mr. Sobeloff: Witness with you, Mr. Paisley.

Cross-examination.

By Mr. Paisley:

Q. Mr. Kann, how many of these men were dissatisfied with their pay?

A. I would say all of them. I would say all—do you mean those that complained to me direct?

[fol. 440] Q. Yes.

A. Those that complained to me directly were Mr. Feldman, Mr. Prail and Billy Kann. I don't think Mr. Deibert had ever talked to me about it, nor I don't think Mr. Willis, although he was in some of the meetings when the complaints were registered.

Q. How much salary were you paying Feldman?

A. I would not know without looking at the records. I don't know what we were paying Feldman.

Q. Weren't you paying attention to it during the testimony?

A. Yes, sir, I think it was around \$7200. I know it was in the \$7000 brackets.

Q. How old a man is he?

A. I think Mr. Feldman must be in his 30's.

Q. How long had he been with the company?

A. I think he has been with the company since its inception, since he graduated from school. I think it is the only position he has had.

Q. He did not start out with any such salary as that, did he?

[fel. 441] A. No, sir.

Q. What was he making in 1941, do you know?

A. I would only be guessing. I don't remember those figures. I think they are all here. You can get them out and I can verify them, probably. I don't have any records of salaries with me.

Q. How much did Triumph pay him in 1942?

A. I think a total of some \$12,000.

Q. Triumph?

A. Yes, sir. That is what you asked me.

Q. Now, how about Willis? How old a man is he?

A. I don't know. I think they are all in the same age bracket except Mr. Prial, who is a much older man.

Q. He started out with the company several years before that, didn't he?

A. I think he studied engineering—or, rather, chemistry, and came right to work there.

Q. They are nominal salaries, to begin with?

A. I don't know the starting salaries.

Q. And he has worked up to the figures shown in the minute book, I take it?

[fel. 442] A. Yes, sir.

Q. How much did you pay him in 1942?

A. I think he got less than, somewhat less than Mr. Feldman. I am not sure. It may have been a few hundreds or a thousand dollars less.

Q. How about Mr. Diebert? What kind of work did he do?

A. Mr. Deibert was in charge of the entire plant maintenance. He did repair work and looked after the heating and lighting and stuff of that kind.

Q. Was he dissatisfied, too?

A. I said I never discussed with Mr. Deibert anything. I don't know. It struck me that he was not dissatisfied with his salary.

Q. As a matter of fact, didn't you insist that Kann, junior, be put in this thing and Mr. Decker insisted that he be put in it?

A. I did say inasmuch as they were taking all the key men into this thing, I thought every key man should be treated alike, and I did suggest that Mr. William L. Kann, Jr., be put into this thing, that is correct. I don't know [fol. 443] whether Mr. Decker suggested it. I can not recall that he did. I don't remember that.

Q. Now, Feldman got from these two corporations in 1942 around \$25,000, didn't he?

A. I don't think quite as much. I think around \$20,000.

Q. Didn't he get some more from some other sources?

A. I don't know what he got from the other sources. I don't know what you mean.

Q. How much is he getting now from Triumph?

A. He just told me the other day. I asked him that question. I think it is \$14,000. I am not sure. I have no way of knowing.

Q. As a matter of fact, isn't it \$11,400?

[fol. 444] A. I don't know. He told me the other day. I have no connection with Triumph and I don't know what they are paying him. That is what I am told.

Q. Well, Willis is still working there, isn't he?

A. I think they are all working there except—no, Mr. Willis isn't working there.

Mr. Sobeloff: Your Honor, I have no objection to the information coming out, but I don't think this man ought to be asked that. If you want to go into salaries paid Triumph employees, including executives, we will welcome that very much.

By Mr. Paisley:

Q. How much is Prial getting now, do you know?

Mr. Sobeloff: I object, your Honor.

The Court: I sustain the objection on the ground that the witness has been away from the company for a year and would have no direct knowledge of the matter.

Q. Did Mr. Prial tell you how much he is now getting?

A. Mr. Deibert?

Q. Mr. Prial?

A. Oh, I am sorry. I misunderstood you. I think Prial [fol. 445] is getting more than the other men. I am not sure about Mr. Prial. I don't think he has told me. I understand he is getting more.

Q. Now, do I understand your testimony to be that Triumph did not want this business?

A. On the original thought of the contract, they did not want it.

Q. Didn't it take some other War Department contracts afterwards?

A. Stuff that we were regularly performing, many of them.

Q. Didn't it take some Navy Department contracts after that?

A. No, sir. That was taken before that.

[fol. 446] Q. It did not take any Navy Department contracts?

A. I say it continued to take contracts right along.

Q. As a matter of fact, didn't you have a man in Washington, in fact, one of your directors, Mr. Shirley, who was on a five per cent commission for all the business he could get from the Government? Is that right?

Mr. Sobeloff: May it please the Court, we can, perhaps, shorten this. It isn't our contention that this company wanted to go out of business. It is our contention that it did not want contracts involving hundreds of thousands of dollars in new and fixed assets. But the stuff that they were regularly performing, as Mr. Kann put it, they were willing to continue to get contracts for.

The Court: I think the examination is proper.

(Question read by the reporter.)

A. Yes, sir. We did have such a man—we did have such a man.

Q. And you did have a contract to pay him five per cent commission on all Government business?

A. I don't know that it covered all Government business. [fol. 447] I know the incendiary bomb contract was not covered.

Q. What did it cover?

A. It covered our regular items which we were producing at that time, and I might say, as long as you have put the question to me, Mr. Paisley, I think I should be allowed to say that the man was not getting five per cent commission for selling. That was only a proportion of his services. Most of his services were engineering.

Q. And don't you know that he was kicking back half of it to Mr. Decker?

Mr. Sobeloff: I object to that as not pertinent to this case.

The Court: I do not think that is proper.

Q. Well, I will ask you this: Did you get any part of the five per cent commission?

Mr. Sobeloff: I object to that.

The Court: I will sustain the objection to it at the present time.

Q. Did I understand you to say, Mr. Kann—

Mr. Sobeloff: Your Honor, before we pass that, on my objection your Honor excluded the answer and, of course, I can not complain of the Court's ruling; but the very [fol. 448] asking of the question puts us under a handicap.

The Court: Do you want it answered?

Mr. Sobeloff: I think, on the whole, he might as well answer it.

The Court: Oh, certainly. I thought you objected to it. Go ahead. Objection withdrawn.

Mr. Sobeloff: We think since the question is asked, the answer ought to be taken.

The Court: I only sustained it because you objected.

Mr. Sobeloff: Yes, sir, because we don't want to go into matters that we are not prepared to defend here. You might as well answer that, the Court says you may answer. He asked you whether you got any part of this five per cent from Colonel Shirley.

The Witness: No, sir. I did not get any of the five per cent.

By Mr. Paisley:

Q. Did I understand you to say the bank would not lend you any additional money to carry on this job of making incendiary bombs?

[fol. 449] A. We had a loan agreement which gave us a line of credit at that time, but we were not allowed to exceed a certain amount over a certain period. Rather, I should say, we were not allowed to expend beyond a certain amount within a stated period for capital expenditures, that is, on the outside.

Q. I understand that was so, too, but I also understood you to testify that the bank would not lend you any additional money so that you could carry on this contract; didn't you so testify?

A. No, sir. I don't think so.

Q. As a matter of fact, you did not need any additional financing to carry on the contract, did you?

A. We had a revolving line of credit which, as fast as we shipped, we could get more money. We could borrow every day, practically.

Q. Tell the Court and jury how much the Government was going to advance you on the incendiary bomb contract?

A. I think it was up to forty per cent of the incendiary bomb contract.

Q. So you did not need any bank financing of Elk [fol. 450] Mills Loading Corporation to carry out that contract, did you?

A. We would have needed—what do you mean, to pay for the plant, Mr. Paisley?

Q. I thought you stated that your principal function there with the Elk Mills was to establish its credit?

A. Yes, sir. I will explain. I was stopped before I completed my explanation of that. When the Government advances any money on any particular contract, that money is earmarked and every expenditure from that particular advance must be approved by some Government representative, and that necessitates, before you purchase anything, or before you use any of that money, everything is being kept so rigidly separate from your other financing, it is an impossible task to do, and we wanted to get enough money to immediately return that Government financing so we would not have to be bothered with that

great deal of trouble, and that money, or most of it, was returned some time thereafter.

Q. You say it was after August 17th that you learned of the lumber deal?

[fol. 451] A. Yes, sir.

Q. Didn't you insist that these men put that money back immediately?

A. Yes, sir.

Q. How did it happen that it was not done?

A. Everything was in such confusion down there at that particular time, I don't know why it was not done. I know they said they would return it, and I did not watch to see when they did. They all agreed to return it immediately after I spoke to them, which may have been after the 24th, or whenever it was. They all agreed to return it, and I knew they would.

Q. As a director and officer of both of those corporations, didn't you insist that it be done right now, or did you leave it hanging up in the air?

A. As I say, I had many things to do, I did not follow that particular thing. I knew it would be done.

Mr. Sobeloff: And it was done.

The Witness: It was done. Some of it earlier than the others. I know some of the boys returned it before the others. I can not recall the dates.

[fol. 452] By Mr. Paisley:

Q. As a matter of fact, it was not done until after the director's meeting on October 1st, 1942, when the matter was disclosed to other directors, was it?

A. I don't know the dates when any of it was returned. I think some of the checks were returned before October 1st.

The Court: To whom was it returned?

The Witness: To the Elk Mills Corporation. That is who received the money.

The Court: They actually got the money from this man Jackson.

The Witness: Yes, sir; but Jackson had used Elk Mills lumber, or money to pay for it.

By Mr. Paisley:

Q. Then you mean to tell the Court and jury that William L. Kann, Jr., accepted that money from Jackson without your knowledge?

A. I did not know that he meant to accept it. I know I knew nothing about the lumber deal. I mean to say it was never told me. I never had any knowledge about this [fol. 453] lumber deal until told me by Mr. Sabel, which was after the time Mr. Seidman came to Elkton. I was not in Elkton on July 21st, 22nd or 23rd. I was there the 24th and 25th of that week, and all that transaction happened before that time.

Q. As a matter of fact, wasn't W. L. Kann, Jr., designated as the man to get your approval of that? Didn't he come to you with it?

A. He never came to me with it.

Q. You deny that?

A. Yes, sir.

Q. And all of these other men endorsed that check and took the money without your knowledge?

A. Yes, sir.

Q. And you deny that you approved of the payment of the bill to Mr. Jackson?

A. I never talked to Mr. Jackson about a bill on July 21st or July 22nd, nor do I ever remember approving of any bill of Mr. Jackson's to Mr. Jackson or having any conversation with him at all, outside of a casual greeting in the plant. I never discussed any business affairs with [fol. 454] Mr. Jackson during my entire connection with that company and only knew him casually.

Q. And you are very positive you were not in Elkton on July 21st and 22nd?

A. Yes, sir.

Q. You did not tell us whether you were there around that date?

A. Yes, sir. I said I was there around the 24th and 25th.

Q. You were?

A. Yes, sir, because there was a directors' meeting on July 24th. In fact, I am doubly sure that I always went to Elkton during that particular summer on Fridays. It so happened my wife was very ill and in Atlantic City and I used to go up to Elkton on Friday and stay until Saturday and go to Atlantic City on Saturday and stay

until Sunday evening. My wife died afterwards and I have the week ends clearly in mind. I never spent any other days in Elkton or rarely any other days.

Q. Then you deny that you participated in any scheme to defraud the corporation and its stockholders with these other defendants?

[fols. 455-473] A. Yes, sir; and I don't think anybody had any idea of any such scheme. This was a perfectly legitimate scheme and a perfectly fair and reasonable scheme, and nothing dishonest was attempted to be done in the whole thing.

Q. As a matter of fact, didn't you participate in several schemes to defraud Triumph and stockholders along about this same time, with Mr. Decker?

A. I was convicted—

Q. I did not ask you if you were convicted of anything. I asked you if you did not participate in several schemes to defraud Triumph and its stockholders along about this same time?

A. I don't know that they were schemes. I think the money in the main was used legitimately.

Q. Do you recall the purchase of the land on which the office building stands?

A. Yes, sir.

Q. You were a director when it was purchased, weren't you?

A. Are you talking about Elk Mills?

.

[fol. 474] Q. Mr. Kann, you say that you did not scheme with your co-director and co-defendant, Mr. Decker, to defraud this corporation, Triumph Explosives, as alleged in this indictment?

A. I must claim the ground of personal privilege.

Mr. Sobeloff: On the charge in the indictment?

The Witness: On the charge in the indictment, absolutely.

By Mr. Paisley:

Q. Isn't it a fact, Mr. Kann, that on December 23, 1941, a check of Triumph for \$10,000 was issued to G. M. Decker and endorsed for deposit in the checking account of Gertrude M. Decker; and isn't it a fact that on December 26,

1941, you received a check from Gertrude M. Decker for \$2,500, drawn on her bank account at the Farmers Trust Company of Newark, at Newark, Delaware, and that you endorsed that check; and isn't it a fact that the \$10,000 was in payment for a piece of real estate which had been purchased by the Triumph from Mrs. Decker; and isn't it a fact that Mr. Decker came to you and told you that the land could be bought for \$5,000; and isn't it a fact that you and Decker agreed and caused the corporation to pay \$10,000 for the land; and that you would get one-half of the additional \$5,000; and isn't it a fact that the \$2500 check which I have mentioned previously was your part of the proceeds of that transaction?

[fol. 493] The Witness: On the advice of counsel I must claim personal privilege and decline to answer the question, as it may inculpate me in further federal prosecutions.

[fol. 494] Q. And, how long had Mr. Criswell been with this Triumph Explosives Corporation?

A. Ever since its inception.

Q. Did he start out as a minor employee?

A. No, I would not say a minor employee. I think he always had an executive position.

Q. What salary did he start out with?

A. I don't remember.

Q. You don't know?

A. No.

Q. Will you tell the jury what he was getting in 1938?

A. No, I can not.

Q. Have you any idea?

A. I imagine he was getting eight or ten thousand dollars; I am not sure. I haven't any idea what his salary was at that time.

Q. Did he own any stock in Triumph?

A. Yes.

Q. How much?

[fol. 495] A. I don't know. A couple thousand shares, I think.

By Mr. Paisley:

Q. Was he making eight or ten thousand dollars a year in 1938?

A. I am not sure. I don't remember his salary.

Q. Can you give the jury any idea?

A. No, sir.

[fol. 496] By Mr. Paisley:

Q. I will ask you this question. You were president of Triumph, weren't you?

A. When? In 1938?

Q. Yes.

A. Yes.

Q. And in 1939?

A. Yes.

Q. And 1940?

[fol. 497] A. Yes.

Q. And down to the time you resigned in October of 1942?

A. That is right.

Q. What position did Mr. Criswell hold in the corporation?

A. Vice-President, second vice-president.

Q. And Decker was first vice-president?

A. Executive vice-president and general manager.

Q. Just what function did Mr. Criswell perform in the organization?

A. Mr. Criswell had so many duties that it would take quite some time to tell them. He did a little bit of everything. I think he took care of answering all important letters and general supervision of the office, and all kinds of reports, the supervision of reports. His duties were varied. He had a great many duties.

Q. Had he been with the Company for a long time?

A. Yes.

Q. I have one other question, sir. Have you heretofore been convicted of a felony?

[fol. 498] Yes, sir.

Direct examination.

By Mr. Sobeloff:

Q. Mr. Forestell, you testified yesterday, I think it was, that you handled the real estate transaction for the acquisition of the land known as the Gilpin property, where the Elk Mills buildings were erected?

A. Yes; I did.

Q. Some point has been made of the fact that that [fol. 499] land was purchased in the purchase contract in the name of Triumph rather than Elk Mills, or, rather, in the name of the individuals who were to pay for it. Now, if you know the reason why the matter was handled in that way, will you explain it to the Court and Jury?

Q. Suppose you explain it as well as you can without that.

A. The contract with Garrett, the agent, was taken in the name of Triumph.

Q. Why?

A. At that particular time, in addition to the 55.7 acres of land, Triumph wanted a right of way to a water line from the Singlerly Road over into the plant.

[fol. 500] The right of way of the waterline was not on the 55.7 acres of land.

Q. It was on that land?

A. No, sir; it was on the Gilpin land, I think about two or three hundred yards north. When the contract was given to me I had Mr. Crothers, the civil engineer—

Q. In Elkton?

A. Yes, in Elkton, make a survey of that. There is a plat showing the water line and the property that was supposed to go to the Elk Mills Loading Corporation. The consideration was something like \$11,000. Rather than taking the responsibility for searching the title myself I employed the Maryland Title Company. They gave me a report indicating that the title was defective because there were certain cross remainder.

Mr. Paisley: In the interest of saving time, I suppose what counsel is seeking to prove is that there was some defect in the title which resulted in delays.

Mr. Sobeloff: No, no; I think that has been sufficiently proved. There is something else I want to prove. If you want me to state it, I will be glad to do it.

[fol. 501] The Court: Go ahead, Mr. Witness.

The Witness: As I say, the Title Company gave me a report indicating the title was defective due to cross remainder. The property came to the Gilpins through the will of an earlier Gilpin. Then, to clear the title, there had to be proceedings in the Circuit Court of Cecil County. That was held, I think, sometime during the summer. I think the title was cleared and that the property was all settled for in the summer; but I may be mistaken about that. The deeds will indicate that.

By Mr. Paisley:

Q. I am not so much concerned at the moment with the delays or the reasons for the delays, but what I wish to direct your attention to particularly is the reason why it was decided, and by whom it was decided, that the property should be acquired by Triumph rather than by the individuals who would pay for it.

[fol. 502] A. Well, it was my understanding that the individuals were to pay for it, when the Court passed the Order sustaining the validity of the title, they gave us, I think it was, ten days in which to pay the purchase money or order the property resold. I think it was on the last day I approached Billy Kann—

Q. Junior?

A. Junior, and told him that we had to pay for the property. At that time he had an office right next to mine. It was in the afternoon and he got together with Prial, Feldman and Mr. Deibert and Willis. Each of them was to give me a check, and they did give me a check. I took it to my office and had my secretary type the checks up, took it back for their signature, but before they signed the checks Mr. Feldman said, "Wait a second, you better let me talk to George Sabel about this." George Sabel, at that time, was in Mr. Jackson's office and it was down the corridor—I was down the corridor when Mr. Sabel came out and said, "Frank, give a check from Triumph and pay off that property." That is the check the Court has in my name.

Q. Now, we will perhaps call Mr. Sabel and explain why [fol. 503] he advised that, but that was right on the eve of the settlement, wasn't it?

A. Yes.

Q. That was in October, or just a few days at most before settlement?

A. The date will indicate that.

Q. But I am still not especially concerned about that. What I want to know is, why, in the first place, was the contract made in the name of Triumph if, as you say, it was the intention of the individuals to pay for the land?

A. Well, I would not know that because I did not get into it until the contract was handed to me.

Q. Perhaps I can remind you of something. You mentioned that there was a right of way.

A. Yes, a water line right of way from the Singerly Road right into the plant.

Q. Had Triumph built a dam on this Gilpin property?

A. Not to my knowledge. I don't know.

Q. You don't know about that?

A. No.

Q. Was there any purpose in connection with the taking [fol. 504] of the contract in Triumph's name, that the deed was to be put in their name, first, so they could preserve the waterway rights?

Q. Have you any recollection on that at all?

A. No. I know there was that waterway that had to be protected for Triumph.

Q. There was a waterway that had to be protected?

A. Yes.

Q. Who in the Title Company handled that?

A. Mr. Jira, I believe. He argued the case in the Circuit Court.

Q. Do you remember any discussions taking place of the reasons why the contract should be taken in the name of Triumph?

[fol. 505] A. No, I don't remember. The only thing I remember is that the contract was handed to me.

Q. By whom?

A. I don't recall.

Q. All right, sir. Thank you. By the way, you have your office at the Triumph plant?

A. Yes.

Q. Did they have a sign for the Elk Mills Loading Corporation?

A. Yes.

Q. Where was that?

A. Well, it was in the last office I occupied. I think I occupied, through my short stay there I occupied a half dozen offices.

Q. Yes, but where was the sign?

A. The sign was on the door, the Elk Mills Loading Company or Corporation, and my name under it.

Q. Was that in the main corridor of the place?

A. The main corridor. And shortly after—I mean shortly before October 13th, when the Navy Department took over, I was transferred to Mr. Criswell's office.

Cross-examination.

By Mr. Paisley:

Q. As I understand, Mr. Forestell, you went to these various individuals and told them you wanted a check for their proportion of the balance due?

A. Yes.

Q. Did you have any blank checks on their respective banks?

A. No. They gave me a check.

Q. And you had them typed up?

A. I had them typed up.

Q. Who was the payee?

A. Well, they were payable to me, and the reason for that was, there were two interests in this Gilpin estate.

Q. And you were an attorney?

A. And I was the attorney, and I planned to deposit the money—

Q. But after they talked to George Sabel, the auditor, was the Triumph check brought to you?

A. No. I am sure I got the check. I went to Willard [fol. 507] Vernon.

Q. Who told you to go to Willard Vernon?

A. Well, that was the customary practice, I mean.

Q. Who told you?

A. Nobody told me to go there.

Q. Who told you that you should not use these checks of the individuals.

A. Mr. Sabel told me to get a check from Triumph Explosives and use that in the purchase of this land.

Q. What did you do with the checks of these individuals?

A. Well, the last I remember, they were left with Mr. Feldman. I don't know what he did with them. I didn't have them.

Q. You did not endorse them over to Triumph?

A. No.

Mr. Paisley: That is all.

The Court: As I understand, the reason that you give as to why the checks of the individuals were not used, was that although the checks had been drawn and collected and settled, ready to give to you, Mr. Feldman, one of these key men, subsequently, on the same day, came to you and [fol. 508] said that Mr. Sabel had said to use a check of the Triumph?

The Witness: No. Mr. Sabel told me that himself.

The Court: He told you that directly, did he?

The Witness: But Mr. Feldman—these boys were all grouped in their office. As I stated, I went to see Mr. Sabel about this and he went down to Mr. Jackson's office and Sabel came and told me to get a check of the Triumph Explosives and use it in the settlement of the real estate.

The Court: Had you received into your hands the checks of these key men?

The Witness: No, your Honor. I don't think I had.

The Court: Did you ever see them?

The Witness: Yes, sir. As a matter of fact, I got a blank check from each one of them and I had them typed up. My secretary typed the checks up and I then returned them for signature.

The Court: Well, you handed them back to Feldman, did you?

The Witness: Yes. I am sure Mr. Feldman had them.

The Court: Very well.

[fol. 509] Mr. Sobeloff: Your Honor, in this connection it may be helpful if I recall to the Court and jury the minutes of October 1st which explained the reason that Mr. Sabel gave for advising that Triumph should pay the check. It was in connection with plan to have the stock to the extent of 45 per cent issued to these men returned to the company,

and the whole thing undone, inasmuch as they had not paid up to that time. This was in October. I think Mr. Sabel is in court. I will call him to get the details; but I recall that was read in the minutes. I don't have the original minutes and I just don't pick this up quickly. But I am sure it is in these minutes.

Mr. Sobeloff: (Reading) "After a thorough discussion, it was suggested that it would be to the best interests of Triumph that Triumph own all of the stock of Elk Mills Loading Company, and Triumph should request the individuals who now hold 45 per cent of the stock of Elk Mills [fol. 510] Loading Company, that they return said stock to Triumph, in consideration of Triumph readjusting salaries of said individuals, and likewise making payment of the balance of the purchase price of the property, as well as reimbursing all individuals for any cash expenditures, which said individuals may have had in connection therewith."

In other words, the company was to pay for the land, take the deed, and get the stock, and these men were to be otherwise adjusted in their salaries. That is, from the minutes of October 1st, 1942.

GEORGE J. SABEL

Mr. Sobeloff: Before Mr. Sabel testifies, I would like to say to the Court that the other day I conferred with Mr. Buck and Mr. Jira, of the Title Company, and they told me to call Mr. Jira to testify to this point whenever I wanted him, and they gave me the application No. 66615 in their file. But now, when I telephoned Mr. Jira, I learned [fol. 511] that he is out of the city. I thought I ought to make that explanation.

Direct examination.

By Mr. Sobeloff:

Q. Mr. Sabel, you were the auditor of Triumph Explosives on October 1st, 1942, and for some time previously?

A. Yes, sir.

Q. It has been testified here that you advised the individual checks of the people we call here the key men should not be used for the acquisition of the Gilpin property, but that a Triumph check should be used, and that the title should be taken direct in the name of the company. Will you explain if you did give them that advice, under what circumstances you gave it?

A. As I recollect it, it was subsequent to the meeting of October 1, 1942, wherein it had been decided that the stock held by the key men of Elk Mills Loading Company would return their stock to the Elk Mills Loading Corporation, and knowing that, I saw no reason for the issuance of any check other than Triumph's check, because I took the position that the property should belong to the parent corporation.

Q. The consideration for the stock originally that was [fol. 512] issued to these men was that they were to buy the property for the company, for the Elk Mills. They were to pay for the property, is that right?

A. The minutes of the—

Q. And since that was not to happen, since they were not to get the stock, then Triumph paid for the property and took it direct?

A. Yes. Just as I said before.

Cross-examination:

By Mr. Paisley:

Q. Mr. Sabel, how long have you been auditor for Triumph?

A. Since about 1936.

Q. You are a certified public accountant?

A. Yes.

Q. And you maintain an office in Pittsburgh?

A. Yes.

Q. Are you auditor of any other corporations in which Mr. Kann is interested?

A. Yes, sir.

[fol. 513] Q. Did you yourself have authority to decide a question of that kind?

A. No, sir.

Q. Did you take it up with Mr. Kann?

A. No, sir.

[fol. 514] Mr. Sobeloff: Now, your Honor, I would like to read to the jury this short paragraph from Mr. MacBride's prospectus for Triumph Explosives, Incorporated, which was identified as Defendants' Exhibit 1.

The Court: If it isn't very long you may read it.

Mr. Sobeloff: It is just a short paragraph. I want to show he had heard about Atomite:

"During the last year, at some considerable expense of time and money, the company has investigated and developed and patented an explosive. This patented explosive Atomite can be produced at a lower cost than competing products. It also enjoys decided safety advantages over competing products. Since Atomite is intended primarily for commercial use, these features are of particular importance. The company has entered into arrangements with the U. S. Powder Corporation of Nevada, the owner of the patent, whereby the company will control the manufacture and sale of Atomite through a corporation, the stock of which will be owned equally by the company and by the U. S. Powder Corporation of Nevada. The company is about to erect an experimental plant, pilot plant, for the purpose of protecting manufacturing process. [fols. 515-523] It expects within a year the new explosive will be produced in commercial quantities."

[fol. 524]

COLLOQUY

The Court: The one question on which I would be glad to hear counsel is this prayer as to mailing. "The Court instructs the jury the verdict must be for the defendant Kann because of the uncontradicted evidence that the alleged mailing was not in furtherance of any scheme by the defendant to defraud."

Mr. Sobeloff: Yes, sir. I think that presents a substantial question. Your Honor, will recall that in the other mail fraud case, it was a very close point, and your Honor drew a distinction between some of the cases we were relying on and the case then at bar, and pointed out that there

was a continuing scheme, that there was a series of checks, [fol. 525] all related to one another, and that it was necessary for them all to clear in order that the scheme might succeed, that the disclosure of the scheme would interrupt its execution. Your Honor's language in the opinion which is published on August 2, 1943, in the Daily Record, is this language:

"But this contention of the defendant's ignores the real nature of the scheme to defraud in this case. The scheme was a continuing one formed in 1941 and running over the period of a year thereafter. It was not an isolated transaction in which a person fraudulently obtains the check of another on a foreign bank and immediately has it cashed." And may I interrupt the reading to add that in this case you have just that; two checks that were cashed. "Here the scheme," your Honor says, "was by officers of the corporation to defraud not the local Elkton Bank but the corporation of which they were officers, by drawing checks on the corporation's bank accounts and concealing the transaction by false entries on the corporate books. Clearly the defendants contemplated that the checks on the Pittsburgh bank would in due course of banking practice be forwarded by mail and paid by the Pittsburgh bank [fol. 526] and charged to the corporation's account." Then your Honor says that they had no thought of simply abstracting a sum of money from the corporation and then discontinuing their relations with the corporation. "It was of the essence of their scheme that the moneys of the corporation should be effectively withdrawn from the bank account and proper withdrawals concealed by false entries on the books, as a continuing scheme lasting over a period of many months and doubtless intended to be concealed forever."

That was spoken, your Honor will recall, with respect to a series of items charged as commissions and, so far as the items show, falsely and improperly charged. You do not have that fact situation in this case. Here you have two mailings; one of this \$5,000 check of Willis'—

The Court: I quite appreciate there are factual distinctions in the evidence between the mailing in the case that was tried and resulted or caused this opinion to be written on motions for a new trial. What I will be glad to have counsel do is to point out to me what is the effect as

alleged of the mailing in this case. The mailing here is covered by a brief stipulation and we have not given much [fol. 527] thought to it in the evidence in the case, and I would like you to point out to me why it is so clear that the mailing here of the checks was not in furtherance of the scheme, that I ought to tell the jury that they can not convict for that reason.

Mr. Sobeloff: Now, the stipulation reads: "The check described in the second count of the indictment was cashed by the payees named therein at the People's Bank of Elkton, Maryland, and was by said bank deposited in the United States mails at Elkton, Maryland, to be sent and delivered by the Post Office establishment of the United States on or about July 22, 1942, to the Equitable Trust Company at Wilmington, Delaware. Said check in due course was received from the United States mails by said Equitable Trust Company at Wilmington, Delaware."

Now, there you had the cashing of the check—

The Court: I do not interpret the cashing of the check there as being anything more than they got the money from the Elkton Bank.

Mr. Sobeloff: That is right.

The Court: And that that was true in the other case.

[fol. 528] Mr. Sobeloff: Yes, that was true in the other case.

The Court: And, of course, this check you are now referring to was drawn on a Wilmington Bank.

Mr. Sobeloff: Yes.

The Court: And deposited by these people in Elkton.

Mr. Sobeloff: That is right.

The Court: You can argue, certainly, before the jury that the facts do not show, from your point of view, that the mailing of the check was caused by the defendant or that he is responsible for it. In other words, I think the objection you are now making goes to the weight and not to the legal sufficiency of the evidence.

Mr. Sobeloff: I think it is not necessary to consider the third count separately from the second, from what your Honor has indicated. I think the same proposition holds true in both cases.

The Court: Now, Mr. Paisley, I would like you to tell me the affirmative view as to why you consider that the mailing of these two checks was in furtherance of the scheme. The

case on the facts with regard to the mailing, I think you [fol. 529] must appreciate, is less strong than in the other case that was tried. At least, that is the way it impresses me, but I will be glad to hear what you have to say about it.

Mr. Paisley: If your Honor pleases, the check described in the second count of the indictment is the check which was made payable to these individuals for the lumber.

The Court: Yes.

Mr. Paisley: That check was taken down to the bank at Elkton and cashed by them. Now, it is alleged in the indictment that part of the scheme was these men were to acquire the stock of this corporation, 45 per cent of it, without paying a valuable consideration. In other words, part of the scheme was they were to get this stock for nothing, and this check was a vital part of the scheme. The acquisition of this money with which to pay for the land was a vital part of the scheme.

The Court: Aren't you a little off the point there with regard to the evidence? Isn't this check we are now talking about, that \$12,000 check, the check given by Jackson to these individuals for the lumber account?

[fol. 530] Mr. Paisley: That is right, sir.

The Court: Well, now, that is not a check of Triumph.

Mr. Paisley: That is right.

The Court: It is a check of Jackson given them for the lumber. It had no relation, so far as Jackson is concerned, at least, in payment of the stock.

Mr. Paisley: My point is, your Honor, that fundamentally the charge is that the defendant devised a scheme to defraud Triumph by the creation of a subsidiary for the purpose of siphoning off its substance. Now, that check was given in execution of that scheme, we contend. That is what their scheme was, as I stated, and it was a vital part of the scheme that they acquire the stock for nothing and thus contribute to the fraud on Triumph—

The Court: Yes, but wasn't this sort of an extra dividend to them from the scheme?

Mr. Paisley: It is true, your Honor, that the lumber transaction is a little scheme in and of itself fraudulent not only on Triumph, but on Elk Mills. But it is also part of the general scheme which was to defraud Triumph by [fol. 531] siphoning off its assets.

Of course, after the checks—here is the point I was not able to think through then. It is not necessary, your Honor, for mailing, in cases of this kind, the mailing of the victim's check. Nothing is better settled than that than in these various mail fraud decisions. Use of the mails may be some letter written by the schemer to his proposed victim, in which he is lulling him into a sense of security or in which he is seeking to get him into a state of mind, so that he may later gain his end.

The Court: Yes. It must be in furtherance of the scheme. I see you are prepared to argue there is some evidence to support the view that this is in furtherance of the scheme.

Mr. Paisley: Yes, sir.

The Court: I am not interested in the weight of the argument. That is entirely for the jury. Now, what about this other check?

Mr. Paisley: The other check is one of the bonus checks. Your Honor will remember there were eight \$3,000 checks. [fol. 532] The Court: May I see the stipulation? Somehow or other the original is mislaid for the moment, or misplaced.

(Paper handed to the Court.)

The Court: "The check described in the third count of the indictment was deposited by the payee, V. G. Willis, Jr., in a bank account maintained by him, V. G. Willis, Jr., in Farmers Trust Company of Newark, Newark, Delaware, and said bank in the usual course of business caused said check to be cleared by the use of the United States mails and said check was in fact delivered by the United States mails to the People's Bank of Elkton, Maryland, at Elkton, Maryland, and was paid by said bank on July 9, 1942."

That was a check drawn on the People's Bank of Elkton.

Mr. Paisley: That is right, sir.

The Court: There is no evidence here as to why Willis deposited it in the mail at Wilmington, is there?

Mr. Paisley: No evidence as to why he did it, but evidence that he did it.

The Court: Do you think it can be said to be in contemplation of the defendant Kann that Willis, who was working at [fol. 533] Elkton, should have deposited this check at Wilmington to be sent by mail to Elkton?

Mr. Paisley: I think that was easily foreseeable and that is all that is required. Moreover, your Honor, I don't understand that it is necessary for the defendant, who did not himself mail this letter or check, must have had any specific knowledge that the one did mail it, either mail it or contemplated mailing it. There is more to the stipulation than simply a stipulation about the mailing of these two checks. It shows clearly by the stipulation that it was in contemplation of the parties that the mails would be used—

Mr. Sobeloff: Where is that in the stipulation?

Mr. Paisley: In carrying out this whole scheme to organize the subsidiary corporation, to carry on the business, and ultimately to siphon off the Triumph's profits. They wrote a letter to the Postmaster, back there in the early inception of the corporation, at Elkton, which clearly shows that all parties to the scheme, certainly the writer of the letter, who is shown by the evidence to be—

The Court: Of course, that letter does clearly show it was [fol. 534] contemplated that the Elk Mills would receive mail.

Mr. Paisley: Yes, sir.

The Court: But these checks, of course, at least this second check you are talking about now, is a check of the Elk Mills, and there is nothing to show that it was contemplated that it should be otherwise than delivered to Willis locally and cashed by him locally.

Mr. Paisley: The question, it seems to me, is that the jury may be charged or instructed if it was easily foreseeable when they wrote out those eight \$5,000 checks that the mails would be used in clearing the checks; then they would be justified in finding this defendant guilty.

The Court: Well, if Mr. Sobeloff has said, as I understand, all he has to say about it, I suppose I ought to take a directed verdict on that ground. But it is a matter for counsel to argue to the jury. There is one thought that occurred to me about this first check and as to the defendant's responsibility in regard to it. He denies any knowledge of ever having heard of that check or any knowledge of the arrangement whereby these so called key men [fol. 535] were paid by this so called lumber account. If he never knew anything of the check and it was not within the purview of his knowledge that such a check would be given, it is difficult to understand how he would be respon-

sible for the mailing of it and collecting it. But, I suppose, that is a matter for the jury.

Mr. Sobeloff: Your Honor, on this second count, it seems to me, in addition to the general prayer for an instructed verdict that we offered on both counts, and which I think sufficiently raises the question, and might specifically raise the question that count 2 ought to be dismissed, because there is no evidence from which the jury could possibly infer that Gustav Kann caused the mailing of a check, the very existence of which, it is not shown, he had any knowledge of.

The Court: I know. I am just pointing that out to you and to Mr. Paisley, too. That is a thing you have got to meet or, at least, will have to meet, I suppose, in the argument on the facts. There is some evidence, certainly from which it could be argued that Kann knew about all of this [fol. 536] transaction, the whole of it, everything that went along. He denies that he knew anything about it, and, of course, his credibility as a witness is directly in issue in the case. He contradicts Mr. Jackson as to what Jackson said about approving the lumber account. He says he was not in Elkton that day or the next day. That is a matter for the jury, I suppose. If he did not know of it, if the jury finds he did not know about it, and it was not in his contemplation that such a check should be given, I do not think, as a matter of fact, it ought to be found by the jury that he is responsible for mailing it. But those are questions of fact, I suppose, for the jury to pass on.

Mr. Sobeloff: Your Honor, on the third count, may I direct your Honor to the fact that in the Tinch case, which your Honor cited and which was discussed at great length in the argument the last time, and I won't repeat it, the whole thesis of the Court was that the arrangement was issuing an out of town check to a man, an arrangement about meeting in a bank, and all the maneuvers that were made, directly contemplated the sending of the check out, whereas, as your Honor has pointed out, this was a local [fol. 537] check and handled locally. On that very testimony, I think I am entitled to a directed verdict that there is no basis for an inference in this case on the evidence that there was a contemplation on the part of the defendant, Kann, that this check would be cashed in another place and that the mails would be used.

The Court: I think those are all perfectly legitimate arguments on the facts that can be made before the jury. My observation of the tendency of the cases litigated in Federal Courts is that anything like close questions should be left to the jury in a jury case. In other words, to direct a jury to find a verdict one way or the other, there must be something in the case on the facts which makes it obvious to any reasonable minded man, especially one who is supposed to be familiar with the law, that there could not possibly be but one verdict in the case.

If it is conceded that the evidence here as to the mailing within the statute is weaker than in the other cases, that isn't for me to say to the jury. You must find a verdict of not guilty on that account.

Mr. Sobeloff: I personally do not see how it can fairly [fol. 538] be said there was any contemplation of the mailing of a check, the very existence of which this defendant did not know about, or how it could be said reasonably that he contemplated the mailing of a check, the use of the mails in connection with the cashing of a check that is handled in Elkton, in an Elkton bank, aside from the other question, which is, of course, present in the case, that if that was done, it was done by the payee, Willis, for his own purposes, and not by the defendant or by the direction of the defendant for his purposes.

Now, there is one other thing I should like to ask your Honor to instruct the jury, if you please, sir, on this matter of William L. Kann, Jr., that Mr. Paisley just referred to. [fol. 539] Mr. Sobeloff: I think it is only fair that the jury should be instructed that that letter, which was not introduced in evidence, has no bearing at all on any scheme to use the mails to defraud.

The Court: I do not know just what letter you refer to.

Mr. Sobeloff: It is in the stipulation. You will find it is referred to in the third paragraph of the stipulation:

"The attached carbon of a letter addressed to the Postmaster of Elkton, Maryland, is a true copy of an original letter which was mailed to said postmaster on or about the date shown on said letter."

In the first place, the stipulation is that it is a true copy. It has not been offered.

The Court: Your point is that letter standing by itself would not be sufficient to show a mailing in furtherance of a scheme.

Mr. Sobeloff: That is true.

The Court: I do not understand that counsel for the Government contends to the contrary on that.

[fol. 540] Mr. Sobeloff: Likewise, it would not be any evidence that there was a contemplated scheme to defraud in connection with the checks. This letter has no bearing on the issue.

The Court: You put it in the stipulation. The Court had nothing to do with that. Counsel agreed to it. It is in the stipulation.

Mr. Sobeloff: I only stipulated that it was a correct copy. It has not been offered in evidence. If Mr. Paisley is permitted to argue that that shows a scheme to defraud or a scheme to use the mails, I certainly object to that.

The Court: There is no such thing as a scheme to use the mail. The Statute refers to a scheme to defraud partially or wholly executed, or attempted to be executed by use of the mails.

Mr. Sobeloff: I was unprecise in my statement. I realize there are two factors, the scheme and the use of the mails in its furtherance. I submit that when I stipulate that the attached carbon copy is a true copy of the original, I am not admitting it in evidence, and I certainly think, even [fol. 541] though it were admitted in evidence, that it would not have any probative value such as indicated by Mr. Paisley, and, if he intends so to argue, I should think the Court ought to instruct him that it is not a proper argument.

Mr. Paisley: I am rather surprised that Mr. Sobeloff takes that position about the third paragraph in the stipulation. The very purpose of the stipulation was to dispense with these witnesses who otherwise would have to come here and go through the formality of testifying. I would have to drag the postmaster from Elkton here to show it is the original letter and now, after we have stipulated that this is a true copy of a letter which the postmaster received, for counsel to say it is his understanding that that is not in evidence is beyond me. I believe if he thinks it over, he won't take that position.

Mr. Sobeloff: I don't think that is in evidence. I was consenting to the substitution of a copy for the original.

but my objection is more fundamental. Even if it was in evidence or regarded as in evidence, I think the Court ought to instruct the jury and I request the Court to in-[fol. 542] struct the jury that that is no evidence, that letter is no evidence in support of either a scheme or the use of the mail in connection with the scheme or the execution of the scheme.

The Court: Of course, standing by itself, it is not, but that it is properly in the case, for whatever proper argument can be derived from it, I think is true by the stipulation. Counsel made the stipulation. I think it undoubtedly has the effect of putting the letter into evidence. Now, all the letter shows is that the Elk Mills Loading Corporation contemplated using the United States mails for various purposes that it had. Mr. Paisley apparently draws from that the background. His contention is that this whole Elk Mills was a subterfuge and scheme and sham and artifice to syphon off money from Triumph and that anything they did was in furtherance of that scheme and when they asked definitely, contemplate using the mails, it is not a far cry from the proposition that the checks given in the general carrying out of the plan were contemplated to be sent through the banks and mails used. The question of whether one trier of facts would find the [fol. 543] fact and another might not is not a thing that I can pass on as a matter of law.

Mr. Sobeloff: But doesn't your Honor think that the inference is so remote and attenuated that it is not possible for a reasonable mind to come to that conclusion.

The Court: If that is a rhetorical question, I don't have to answer it.

Mr. Sobeloff: I ask the Court to so rule, that that argument shall not be made.

The Court: I cannot so rule as a matter of law. I will be glad to follow the argument of counsel on both sides as closely as I can. If, after hearing argument on the facts, I am persuaded that there is no evidence at all from which a reasonable man could draw the conclusion that the letter was mailed in furtherance of the scheme, I will tell the jury when it comes to my time to speak to them. At the moment, I do not think I am so convinced myself to that extent.

Mr. Sobeloff: May I reserve an exception on that or must I raise that again?

[fol. 544] The Court: I think you have to raise it again after the final charge to the jury.

Mr. Sobeloff: Or shall I reduce that to writing? Would that be a better practice?

The Court: Perhaps it would.

Mr. Paisley: Among the charges we ask your Honor to give the jury is this charge which Justice Sutherland gave when he was on the Supreme Court, presiding in a trial in New York:

"One who enters or joins a scheme to defraud with knowledge of its dishonesty and who has knowledge that it is to be executed in part through use of mails or who enters into it with entire indifference whether the mails are to be used in executing it, becomes bound by and liable for the act of his co-schemer or co-schemers who while engaged in executing the scheme used mails for the purpose of carrying the scheme into effect."

The Court: What case did he decide that in? Are you sure it was Justice Sutherland or Justice Van Devanter? I know the case he tried up there on that point.

Mr. Paisley: Yes, Justice Van Devanter. I think there [fols. 545-547] is no dispute about that proposition of law. Many cases so hold.

[fol. 548] REQUESTS TO CHARGE ON BEHALF OF
GUSTAV H. KANN

Thereupon the defendant, Gustav H. Kann, by his counsel, at the close of all the evidence, submitted requested instructions to the Jury as follows:

"The Court instructs the Jury that the verdict in this case must be for the defendant, G. H. Kann, because of the uncontradicted evidence that the alleged mailing was not in furtherance of any scheme by the defendant to defraud."

"The defendant, G. H. Kann, prays the Court to instruct the Jury that there is no evidence in this case legally sufficient to warrant a verdict of 'Guilty' and the verdict of the Jury must be 'Not Guilty'."

[fol. 549] Which requests to Charge were, after argument of counsel, overruled and denied, to which denial by

the Court the defendant excepted. (Exceptions No. 10, 11, 12.)

[fol. 550] CHARGE TO THE JURY—October 7, 1943

CHESTNUT, D. J.

The Court: Gentlemen of the Jury, this is the first case that you have tried during your present term of service in this court, and I think I have explained to you already that the last chapter in a trial of a case in the Federal Court is the charge of the judge to the jury, in which he instructs the jury as to the law of the case and sometimes makes a summary of the evidence, and that the functions of the judge and the jury, respectively, are that the judge takes the responsibility for determining and saying what the law in the case is, there being an appeal in most cases, if the Court has misinterpreted the law, but the jury is the sole judge of the facts.

[fol. 551] The way to reach your verdict is to take the law as the judge gives it to you and apply it to the facts, the facts as you find them, they, of course, being uncertain to me, because I do not know how you will find them. Therefore, it so often happens the best the judge can say to the jury is that if you find the facts so and so, your verdict must be so and so; and if, on the other hand, you find the facts to be so and so, then your verdict must be a different verdict. So, in this case, if you find the facts one way, then the law says you must find a verdict of guilty. But, on the other hand, if you find the facts the other way, then, equally, your verdict should be not guilty as to the defendant. Anything I may say or imply in reviewing the case to you, so far as the facts are concerned, is purely advisory to you. The whole, final question of guilty or not guilty is left with the jury. That is your province. My function is simply to aid you to reach a verdict, which you yourselves find, by applying the law in the case to the facts as you find them.

Now, this is a criminal case, and there are some rules of law which apply to all criminal cases, including this [fol. 552] one, which the jury ought always to have in mind.

One is the indictment itself, which is found by a grand jury, is merely the accusation. It is not proof of the charge. The proof of the charge, if it can be proved or

has been proved, is the evidence which is submitted to you, a petit jury, where you hear both sides. A grand jury, as a rule, hears only one side of it, and its function is to determine, assuming the correctness of the evidence, there is ground for an accusation. Then having reached that conclusion, the grand jury formally makes a charge. It is called an indictment, and every man so charged has the right to have his day in court and have a petit jury to determine whether that charge has been made out or not. So this defendant has had his trial, and it is up to you to determine whether the charge made by the grand jury has been made out to your satisfaction beyond a reasonable doubt by the proof in the case.

The measure of proof which the Government must submit to you in a criminal case is different to what is given in a civil case. The ordinary civil case is where one man is suing another man for a sum of money or damage for [fol. 553] an automobile collision, or something of that sort, and the jury properly decides the case on the basis of which side has the stronger, weightier testimony. We call that the preponderance of the evidence, the more weight of the evidence. But in a criminal case the measure of proof demanded from the Government is greater than that in a civil case. The law says, and it has said for many centuries, that no man is to be convicted of a crime unless he is proven guilty beyond a reasonable doubt. Then efforts have been made to define what constitutes a reasonable doubt.

It is not possible in any criminal case, where you are dealing with human agencies, documents, papers, and so on, to prove a case to a mathematical certainty. Nor is the Government obliged to prove a case beyond any doubt whatever. But it must do it beyond a reasonable doubt.

Now, reasonable doubt is the kind of a doubt which a reasonable man, unbiased, unemotional, desiring only to judge the evidence, to say to himself, I feel I have a reason, which, in my judgment, is a good reason for this proposition or against that proposition. So the law says the Government must prove the case beyond a reasonable [fol. 554] doubt. That means that the proof must be thoroughly satisfactory to you. The Government does not have to say or does not have to remove all whimsical doubts or doubts which are conjured up in the mind of a person merely because he is trying to find some doubt.

But, taking the matter and weighing it as you would any matter that importantly affected your own interests, you must decide from the evidence that you have heard whether you are satisfied beyond a reasonable doubt of the truth of the charges made. That is the test of the law.

The defendant comes into court entitled to the presumption of innocence. We do not assume that a man is guilty because he is charged in an indictment. He comes into court, and ought to be looked upon, as an innocent man until the jury determines from the evidence that it has heard that he is not an innocent man but he is a guilty man. The defendant himself does not have to produce the evidence to show that he is innocent. The Government has to produce the evidence to show that he is guilty.

Now, I expect all of you have had enough experience in courts and the like, generally, to have acquired familiarity with the fundamental principles of our English and American law, of the Bill of Rights, and of the American Constitution, to know that those things are true. But, it is my duty as a judge always to call it to the attention of a petit jury in a criminal case.

Now I come to an explanation of the law with respect to this charge which is made against the defendant. The indictment in the case found by the grand jury is in what we call three counts, three separate charges, and you have heard counsel say that the first charge is abandoned. The three counts in this case are all alike, with the exception that each sets up the mailing of a different document, a check in this case. The first count, therefore, alleged the mailing of a particular check. The Government has not produced any proof that that check was mailed. There is proof that the check was issued, given to the defendant, the proceeds were received by him, \$5,000, from this Elk Mills Loading Corporation. But there is no proof that it was sent to him through the mails or received by him through the mails, so that the first count is out of the case, and your verdict on that first count will have to be, not guilty.

[fol. 556] Then there is a second count and third count, in which is charged the mailing of two other checks. There is something I want to say about that in detail a little later on.

In all three counts of the indictment, all three separate charges—chapters, if you want to call them that—there

is the alleged violation of the same Federal statute, and I may say to you, if you have not already understood it, that in this Federal Court in criminal cases the Court has jurisdiction to try only crimes which are embodied in Acts of Congress. We do not try in this court the ordinary run of criminal cases such as assault, battery, robbery, embezzlement, larceny, and things of that kind, which are punished, when convictions are properly had, over in the State courts across the street. The Federal Court deals only with Federal crimes; Acts of Congress constituting an act of crime. Furthermore, the Act has to be passed by Congress pursuant to the Constitution. It must be within the authority given by the Constitution to Congress to pass it. We do not have any question in this case as to the validity or constitutionality of the Act of Congress in this indictment.

[fol. 557] The statute that is involved here is a rather lengthy one in wording, but the essential part of it for this particular case I will read to you.

It is headed, "Using the Mails To Promote Fraud." It is Section 338 of Title 18 of the United States Code. It is a statute which has been in force for a very long time, and the basis of power of Congress to pass such a statute flows from the granted power in the Constitution to the Congress to establish post offices and post roads. Therefore, the whole of the United States post office system is regulated by Congress, a very elaborate system, as you know. This building is very largely devoted to carrying out the requirements locally of the Post Office Department. Congress, of course, has a perfect right to say how the mails shall be used. It is a Governmental agency, supported not only by the money paid for stamps on letters and other mail, but when there is—as there usually has been—a deficit in the Post Office Department, it is supplemented by direct taxes to which we all have to contribute. Congress, therefore, has the right to say to what extent the mails shall be used and how they shall not be used. [fol. 558] That is, shall not be abused, within the wisdom of Congress as to what should and should not be done, and what use should and should not be made of the mails. This Act says:

"Whoever having devised or intending to devise any scheme or artifice to defraud," and then a lot of more

language which is not really in point here, "shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed any letter, postal card, package, circular, pamphlet or advertisement, whether addressed to any person residing within or outside the United States in any post office or station thereof, or street or letter-box of the United States so authorized for depositing mail matter, shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail, according to the direction thereon or the place to which it is directed to be delivered to the person to whom it is addressed, any letter, postal card, package, circular, pamphlet or advertisement, shall be fined not more than \$1000 and imprisoned for not more than five years, or both."

[fol. 559] Now, as counsel has, in their arguments to you, very properly said on both sides, the statute has two elements, both of which must be proven to your satisfaction beyond a reasonable doubt, before you can find a verdict against the defendant. One is the devising of a scheme to defraud. The other is the mailing of some writing in furtherance of that scheme or in execution of the scheme. The philosophy underlying the statute is that Congress forbids the mails to be used for such fraudulent purposes and aims to protect people, citizens of the United States against frauds which may be accomplished, in whole or in part by the use of the mails.

In this case the Government says, and, indeed, it is stipulated, that the mails were used for the mailing, in ordinary course of business by the banks, of two of the checks which are referred to in this indictment. But, of course, the mere use of the mails would not be sufficient to show the furtherance of the scheme unless the mails were used for the purpose of fraud or consummating it or getting the benefits of it, realizing the fruits of it, and so on. I will have a little more to say to you about that [fol. 560] as to the law a little later on. But the two things you want to ask yourselves, Are you satisfied beyond a reasonable doubt, first, that there was a scheme to defraud; and, secondly, was there a mailing or use of the mails in furtherance or in execution of that scheme.

Now, the case, therefore, as to the facts, naturally divides itself into two parts. Was there a scheme to defraud?

It is contended by the Government that there was. It is very vigorously denied by the defendant. So far as what was done is concerned, there isn't much of a controversy as to the facts. The controversy is over the question as to whether there was the fraudulent intent in the matter. Was this organization of the Elk Mills Corporation a bona fide thing, done without any intent to defraud anybody, as an ordinary corporate matter dictated by the practical business necessities of the case? Or was it used merely as a sham, a pretense, as a scheme to siphon off, as the Government counsel has expressed it, profits which would ordinarily have inured to the benefit of the Triumph Company and its stockholders? In other words, were the defendants named in this case, particularly the defendant [fol. 561] on trial, Mr. Kann, was he acting honestly in this matter, or was he acting fraudulently? Did he have a scheme or was he a party to a scheme to defraud the stockholders of the Triumph Company, or was he engaged in perfectly good faith in an ordinary business corporate activity? That is a question for you gentlemen to decide on the facts. As I say, what was actually done is not open to much controversy. The thing you have to determine is whether the intent was to defraud or was it in perfect good faith on the defendants' part?

Now, what was done? This Triumph Company is a Maryland corporation and was engaged for a number of years after 1932, I think the evidence shows, in a substantial but not very large way, in the manufacture of ordinary commercial fireworks. Then, with the outbreak of the European War, and before Pearl Harbor, it commenced to get munition contracts from various sources, including one of importance, the one involved in this case, from the Government of the United States. Some time before December 1, 1941—you remember Pearl Harbor was December 7th, we have every reason to remember that—this corporation [fol. 562] had obtained a very large contract from the Government for the manufacture of incendiary bombs. The amount to be paid by the Government was well over a million dollars. The number of bombs was something like three million, and it was a large contract.

What was the situation with regard to that? The contract was awarded to the Triumph Company. Many people think that a lot of money is made out of munition contracts. It is argued here it was not known whether this

contract would be profitable or not. But the facts, so far as the evidence goes, begins with this. It is said that a Mr. Feldman, who was one of the minor executives, so called key men of this Triumph Company, wrote a memorandum which indicated that when the contract was originally taken, it was really not meant to be taken for the benefit of Triumph so much as for the benefit of the company which he was going to form. And the first plan with regard to the corporation known subsequently as Elk Mills, was that Mr. Feldman, and perhaps two or three others, insiders or employes of the Triumph, were to form this corporation and own it entirely, and Triumph was to get it merely for the benefit or substantially for the benefit [fol. 563] of these employes of Triumph. However, it appears that Mr. Decker, who was the operating vice-president of Triumph, objected to such a plan as that, and I think testimony was to the effect that he said, This will never do, Triumph must be in control, at least, of this subsidiary company, and, thereupon, this plan was changed, and it was contemplated that 7000 shares of stock of the new company would be issued and distributed 1000 shares each to seven unnamed men, including 1000 shares to Mr. Kann, 1000 shares to Mr. Decker, 1000 shares to five, I think, of these so called younger executives and key men of Triumph. That when that plan was proposed—it may have gone even so far as to have been outlined in the corporate minutes—it was shown to Mr. Weil, who is a brother-in-law of Mr. Kann, practicing law in Pittsburgh, a lawyer, apparently, with experience in corporate matters, and he said, Why, no, it won't do for Mr. Kann, as president of the Triumph, or Mr. Decker, as vice-president of the Triumph, to be interested in the stock of this subsidiary, but I see no objection to their being officers of the subsidiary and being given a substantial salary.

The Government says, from the standpoint of getting [fol. 564] money through the subsidiary, which they otherwise would not have gotten except in the organization of the subsidiary, it is not very important whether they got the money as stockholders or as officers, ~~that they did get additional sums in that way.~~

Well, now, progressing with what was done, the corporation was organized by three men—there has to be three incorporators ordinarily in a Maryland corporation, and the three men were immaterial, any three men could have

done it—and when it was done they held an organization meeting and passed resolutions, and all that, the substance of which, as I recall it without having read the minutes in detail, was that 45 per cent of the stock of this new company, the Elk Mills Loading Corporation, was to be divided up among several of the key men, employes, and they were to buy some property, some real estate known subsequently as the Gilpin tract here adjoining the plant of the Triumph Explosives near Elkton and pay for it and convey it to the corporation, and the land was to cost about \$10,000 or \$11,000, and these key men were to put up the money for that, and for the land which they were thus to [fol. 565] buy they were to get 45 per cent of the stock of the new corporation. And then the organization minutes further show that the officers who were elected of the subsidiary company, the Elk Mills Company, were Mr. Decker as president, Mr. Kann as vice-president, and some of the other key men, I think, held other offices, and they were the board of directors. The Government calls attention to the fact that the same insiders of the Triumph who were in control as a majority, at least, of Elk Mills, were also the same four or five people, or included the four or five people, who were in control of Triumph. Triumph, I think, had seven directors, and four of them, consisting of Mr. Decker, Mr. G. H. Kann, Mr. W. L. Kann—I don't know whether Mr. W. L. Kann was a director or not—yes, I think he was, and Mr. Criswell. The other director was this Mr. MacBride, who has been a witness in this case, and Colonel Shirley of Washington, and a Mr. Diamondstone, who was brother-in-law, I believe, of Mr. G. H. Kann, the defendant.

The Government calls attention to the general question of whether this was a sham, a shell corporation, organized [fol. 566] merely for the purpose of siphoning off profits that would otherwise go to Triumph; to the fact, as I recall the evidence, that nobody actually, in fact, contributed one dollar of property to Elk Mills. Nobody was paid anything for the stock actually. Apparently, no property was ever actually conveyed to Elk Mills on the records.

Counsel for the defendant brought out, in that connection, there were reasons why, as a matter of fact, all the moneys were advanced actually by Triumph. For instance, it is said it was really contemplated that these key men

who were to put up proportionately the money to buy the land, \$10,000 or \$11,000, that they would have done that in the first place, but it developed there was a flaw in the title, an equity proceeding had to be conducted, and by the time they were able to get the deed, the whole deal had been called off, after the Government had investigated the matter in connection with the proposed renegotiations of some of the Government contracts, and that although Triumph in fact, paid the purchase price then for the land, it was not because the employees were not ready to pay for it; but, having given up what they had gotten in the matter, [fol. 567] called the whole thing off, realizing that the matter had been abandoned and it was a short cut simply to let Triumph pay for the land and own the land. I think there are two deeds offered in evidence, one from the vendors of the property to Triumph, which was actually recorded, and then, was there not, another deed from Triumph to Elk Mills which was not recorded? Just what is the explanation of that, if the deal had been entirely called off, perhaps is not vitally important in the case.

The facts seems to be, gentlemen, from the evidence, that no money or property was ever actually put up by anybody for Elk Mills, although these employees, it is said, had agreed to put it up. You do not have the benefit of the testimony of any of these key men as witnesses in this case.

The Government also points out, in connection with this contention that this organization of Elk Mills was just a scheme to defraud, that it was a paper and shell corporation, that some sixty odd thousand dollars was paid to the inside officers and junior executives, so called key men, of Triumph, on account of salaries and bonuses declared [fol. 568] by this Elk Mills Corporation, when, as a matter of fact, it did not have more than \$1300 in cash, and that Triumph, as a matter of fact, furnished the money to Elk Mills to pay the salary and bonus. On the other hand, counsel for the defendant, in support of the contention that the whole thing was in good faith, say, Yes, but these sums of money that were actually paid by Triumph were charged to Elk Mills on the books of Triumph and, I suppose, it is further arguable that when the whole transaction was cancelled later on, that the charges were cancelled.

However that may be, the main thing for your consideration is whether the organization of Elk Mills, the way it

was organized, what it did, what it did not do, what Triumph actually did, and what it did not do, whether all that constitutes a scheme or artifice to defraud, as alleged by the Government and denied by the defendant. That is the first and main question for you to decide. You will bear in mind, of course, the undisputed fact that while this Elk Mills Corporation was formed in December, 1941, and apparently got under way in January, 1942, in August of [fol. 569] 1942 the Government began to look into the matter of Triumph and its finances, and so on, in connection with the proposed renegotiations of contracts, and they sent auditors there, Lieutenant Commander Seidman, particularly, and he made a detailed and extensive investigation of the bookkeeping, and so on, and found a great many things to ask about to be embraced in a report to the Navy Department.

One of the things he found out about was this Elk Mills and he mentioned other subsidiaries, as to which we have no real evidence in this case, and upon his conversations with Mr. Decker and Mr. Kann, the substance of the matter was that apparently everybody agreed that what had been done ought not to have been done. That is not necessarily inconsistent with its having been done in good faith. But, at all events, they ought not to have done what they did and they were willing to undo it and to restore what they had received in the way of stock. But I think there is no evidence that any of the sixty odd thousand dollars, which had been distributed actually by the moneys of Triumph and charged to Elk Mills, was returned by these insiders who organized this Elk Mills Corporation.

[fol. 570] Now, from the defendants' standpoint, the defendants maintained that the whole thing was a necessary business corporate arrangement, and when this new contract for incendiary bombs of over \$1,000,000 was obtained, it necessitated the acquisition of additional land and the building of additional buildings, and that Triumph had a banking arrangement with a Pittsburgh bank, People's-Pittsburgh Trust Company, by the terms of which Triumph was not able to expend more money—what was seemingly required was a couple hundred thousand dollars—in buildings, and if it had done that without its consent, the bank could, if it wished to, declare a default in the loan and insist upon Triumph paying back what was then something like a million dollars in money that it owed. I suppose

many of you gentlemen have had bank loans. Some of your loans may at some time have possibly been called by the bank. Such things did happen back in 1933, or around there. Then, of course, it is often very difficult for a merchant or manufacturer who has a large bank loan to pay off immediately. Some people, when they get a loan at the bank, just sort of feel it is indefinite capital that they [fol. 571] can renew from time to time. At all events, what the defendant says in this case is that, our banking arrangements were such we could not carry through this contract, therefore, we had to devise some method of actually manufacturing this material in compliance with the contract which would not violate our agreement with the bank.

Now, that there was this difficulty with the bank is not denied by the Government and not denied in the testimony. [fol. 572] The bank's loan officer, Mr. Lucas, testified about that very clearly. But what the Government complains of is not that there had to be devised some corporate method to meet the situation to avoid the possible calling of the loan by the bank, but that the way in which it was done was not necessarily the way in which it could have been done without depriving Triumph of profits from the subsidiary. For instance, the Government says: "If you want to take on this new contract it would involve changing relations with the bank. Did you ever make a direct request to the bank to change the contract in that respect so that you could carry through the Government contract?" And apparently no such direct request was ever made.

After that counsel for the defendant said: "Yes, we knew from the bank on other occasions that they were not going to make any changes, and you may be satisfied that that was so."

It does not follow necessarily that because that was the bank's attitude, probable or actual, that the plan which was actually devised, which resulted in many thousands of dollars which otherwise would have gone to Triumph's profit [fol. 573] not going to them, was the way in which to have done the thing in order to avoid trouble with the bank. In other words, there may have been several ways in which the thing could have been done without violating the bank agreement and precipitating the call of the bank loan and which not necessarily would have resulted in depriving Triumph of profits it would otherwise have made.

For instance, if the subsidiary had been organized so that Triumph owned all of the stock, or 99 per cent of the stock of the subsidiary, if the subsidiary had then done its own financing, if the officers of the subsidiary were people other than the officers and key employee of Triumph; the key employees of Triumph, being on substantial salaries, although not deemed adequate, but being full-time men, could have simply acted in those capacities without extra compensation.

All of those things you can consider as bearing on the question which you must decide.

As to whether the difficulties with the bank and the asserted desire or insistence of the key men for more compensation [fol. 574] was the real reason for doing what was actually done, or was it merely a straw-man, an excuse put up by these executives of Triumph for carrying through a plan for their own further enrichment as to salary and bonuses and compensation. You understand, of course, gentlemen, that in my reviewing the matter I am simply trying to present to your thoughtful consideration both sides of it—what the Government charges and what counsel for the defendant, or the defendant and his witnesses, say was the situation.

The Government says it is a sham and a pretense, a means to an end, and that is all. The defendant says that it was a necessary business arrangement that had to be made to meet an actual condition, and not a theory. And the reason that is assigned by the defendant for this separate corporation and the plan to give these key men 45 per cent of the stock and give them substantial salaries in addition to their salaries from Triumph, for which they were full-time employees any way, was that these young men demanded that they should be treated in that way or in some [fol. 575] such way, or otherwise they were going to quit.

Now, what evidence do you have on that? Was that a real reason, or is it a pretense on the part of the defendant and associates?

There, again, you do not have any direct testimony from any of these key men. All that we know about the matter is what they are said to have said at some stage of the negotiations.

In that connection, gentlemen, I am going to call to your attention that the defendant is to be judged by what he really believed to be the situation. It is said that when he

came down to a meeting, I think on December 13th, with Mr. Weil, his attorney, that the position of some of these key men who appeared before the meeting was stated by them and was to the effect that they insisted that they should have extra compensation and if they did not get it they were going to leave the company and form their own company.

Now, bear in mind that the contract at that time was in Triumph. Triumph was the legal owner of the contract. It may be difficult to understand how these young men [fol. 576] could have threatened to leave and carry out some contract which they did not own. You may ask yourselves; Where is the evidence that these young men had the financial support to carry through a contract which called for the expenditure of hundreds of thousands of dollars? Did they have established positions in banking circles whereby they could carry out their threat?

In asking that question, gentlemen, I am not intending to indicate any opinion on my part as to what is the fact, but merely that you should take a bird's eye view of the situation and answer for yourselves the question as to whether the two reasons advanced by the defendant in this case for the method of carrying through the thing were real, honest, bona fide business reasons, or were they a mere sham and pretense to justify something that had an entirely different motive, to wit, making extra compensation which otherwise would have gone to Triumph.

Now, if I have not reviewed any of the testimony urged by counsel for the defendant in justification or support of [fol. 577] the position that the whole arrangement was an ordinary business one, you will bear in mind counsel's argument, which has been very fully presented on both sides. I think I will not pause further with regard to it.

Now, if you are not satisfied beyond a reasonable doubt that this was a fraudulent scheme, then you will find a verdict of "Not Guilty" against this defendant; and that is the end of the case.

If, on the other hand, you are satisfied beyond a reasonable doubt that there was a fraudulent scheme here, then the next question that you have to put to yourselves is: Was there a use of the mails as alleged in the second and third counts of the indictment in furtherance or execution of that scheme?

It has been well said to you by counsel for the defendant that that was not a technicality urged by the defendant. It is a substantial thing. The authority of Congress to enact the statute is derived from its authority over the mails. Unless the mails were used improperly there is no offense against the United States. So you can't take [fol. 578] the view, "Oh, well, here the mails were used by somebody, somehow, for some purpose, and there was a fraudulent scheme," if you should so find beyond a reasonable doubt, "and, therefore, the defendant is guilty." You have to consider with equal seriousness the second question of fact. The mails were undoubtedly used at some stage in this whole situation to send through two of these checks. But that is not enough. The Government must satisfy you beyond a reasonable doubt that that use of the mails was in connection with and in furtherance or in execution, as we say, of the scheme itself.

You have the stipulation in this case entered into by counsel which shows that these two checks referred to in the second and third counts of the indictment were sent through the mails for collection in one case—in both cases, I think.

And there is also quoted in this stipulation a letter from Elk Mills Loading Corporation to the Postmaster at Elkton, Maryland, in which the Postmaster is asked to list the name of the Elk Mills Loading Corporation and to put any mail [fol. 579] coming to it through the Elkton Post Office into the box of the Triumph Explosives.

Now, of course, that general authority merely to deliver mail coming to Elk Mills to Triumph is not equivalent in any way to saying that these two checks referred to in the two counts of the indictment were necessarily used in execution of the scheme by the mere request about putting Elk Mills mail into the Post Office box of Triumph. That is no evidence standing merely by itself that these two checks were sent in execution of a scheme, or a fraudulent scheme, or any kind of a scheme.

What counsel for the Government says about that letter is that merely shows that Elk Mills was expecting to use the mails. And, of course, it does show that. But every bona fide business corporation naturally expects to use the mails. So the letter attached to the stipulation is not of itself any evidence as to the use of the mails for the purpose of collecting these two checks.

However, the stipulation itself does say that the mails [fol. 580] were used for these two checks; and the question of fact that is important for you in the case is to find whether the use of the mails for the collection of these two checks was in the execution or in pursuance of the scheme.

The exact language of the statute is: "Shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed, any writing," etc., in the mail, or taking it from the mail.

So that, as is conceded all around, the Government is not limited in proving to your satisfaction beyond a reasonable doubt, if it can, the bare fact that the defendant himself mailed the check. The Government is not required to do that. The question is whether, in execution of the whole scheme, or as a part of it, the mails were used for the purpose of carrying through the scheme of getting the money.

Now, there are some particular requests for instructions to you on the law of the case that I have been asked to give you, and that I do give you. They relate very largely to this particular question of law as to when the mailing in [fol. 581] a case of this kind is fairly to be found to have been in execution of the scheme.

Bear in mind that it is not necessary for the Government to prove that the defendant himself put the letter or writing or check into the box; it is sufficient if it was a part of the whole plan and was done by somebody else.

The courts have said, in further defining those things, what I will now read to you.

"The elements of the offense of using the mails to defraud are the formation of a scheme or artifice to defraud and the use of the mails for the purpose of executing or attempting to execute such scheme or artifice; the latter element being the gist of the offense," meaning thereby by "the gist of the offense" that otherwise there would be no jurisdiction in this Court. Therefore, the use of the mails in the way I mentioned for the purpose mentioned is an essential element of the case.

Then, again, the words of the statute, "knowingly causing [fol. 582] the mails to be used" within the meaning of the mail fraud statute does not involve absolute knowledge or intent, but it is sufficient if the use of the mails may reasonably be foreseen by the defendants as a step in the

execution of the scheme to defraud, or that steps in the causal chain resulting in delivery through mails should have been knowingly set on foot.

One who enters or joins a scheme to defraud with knowledge of its dishonesty, and who has knowledge that it is to be executed in part through the use of the mail, or who enters into it with entire indifference as to whether the mails are to be used in executing it, becomes bound by and liable for the act of his co-schemer or co-schemers, who, while engaged in executing the scheme, use the mail for the purpose of carrying the scheme into effect.

A defendant in a case brought under this statute may cause a letter or check or the writing to be sent or delivered by mail though such mode of transmission was neither known nor intended by the defendants provided the mailing or delivery by post, might possibly have been foreseen.

[fol. 583] I think it must reasonably have been foreseen—more than possibly.

One or more may form and accomplish a scheme to defraud, with or without assistance, and all who, with knowledge of its dishonesty, join themselves to the scheme and participate in any degree in its accomplishment, are guilty under the law, equally with the others, even though they do not have personal knowledge of what is done by other schemers in affecting the general object of the scheme.

It is not necessary for the United States to prove that either of the defendants in this case personally mailed the checks; it is enough if they caused them to be mailed.

In a prosecution for a use of the mails in executing a scheme to defraud the matter mailed need not be criminal or disclose a fraudulent purpose, nor show on its face that it was in furtherance of the scheme; the mailing, however, must be in execution of the scheme or a step in its attempted execution.

Now, in the second count of the Indictment the check [fol. 584] which is referred to and which was sent through the mails, according to this stipulation, is the check to Stephen R. Jackson. You will remember him. He was the building contractor. It is dated July 22, 1942,—“Pay to the order of Messrs. Deibert, Feldman, Kann, Prial and Willis, \$12,062.18.”

That check was drawn on the Industrial Trust Company of Wilmington, Delaware. It is endorsed by these five men, the key men, John J. Prial, Victor G. Willis, Jr., W. L. Kann, Jr., I think—and the rest of the writing on the endorsements is not entirely clear; but "Feldman" I think.

Well, you can look at the check, gentlemen. It is endorsed by the payees. I believe there is no controversy as to that.

Then it bears further stamped endorsements of the Equitable Trust Company of Wilmington, Delaware, and apparently it was cleared through Philadelphia. But the stipulation says as to that check:

"The check described in the second count of the indictment was cashed by the payee named therein, at the People's [fol. 585] Bank of Elkton, Maryland, and was by said bank deposited in the United States mails to be sent and delivered by the Post Office establishment of the United States on or about July 22, 1942, to the Equitable Trust Company at Wilmington, Delaware. Said check in due course was received from the United States mails by said Equitable Trust Company at Wilmington, Delaware."

The mail was used in forwarding the check from the bank in Elkton to the Equitable Trust Company in Wilmington and presumably there presented, possibly without the use of the mails, but through runners to the Industrial Trust Company in Wilmington, by whom it seems to have been cashed, according to the perforated stamp, "Paid 7-24-42", with "6214"—probably the bank's number. I suppose counsel will assume that was the bank's number.

Mr. Sobeloff: I stipulated I make no point on that.

The Court: Perhaps I ought to call to your attention just what this check was. You will remember that the plan for the formation of this corporation was at one time [fol. 586] opposed. It was set forth that these key men, five of them, I believe, were to advance the money to pay for the land and convey the land to the corporation. Before the land was actually conveyed, apparently there was an agreement that the timber on the land could be used and the timber cut down and used partially in the construction of new buildings. Then, without the key men having contributed any sums up to that time, the value of the timber, which of course under the plan belonged to the Elk Mills and through them, as to 55 per cent of the stock, to Tri-

umph Explosives, the value of that timber, in the amount of \$12,062 was paid to the key men. They had not paid anything at the time to anybody. And, of course, if the plan had gone through and they had paid for the land the corporation and not they would have owned the timber.

All of that is frankly conceded by counsel for Mr. Kann. His position about the matter is that he did not know about it and he did not learn about it until a month later when Lieutenant Commander Seidman came to Elkton and investigated the accounts and called it to his attention. And [fol. 587] he said that he disapproved of it and he would try to see that these young men would pay back the money. I think ultimately the money was paid back to Triumph, or to Elk Mills and thus finally to Triumph. But it is this check which is referred to in the indictment.

And the Government contends that Mr. Kann did know all about it. The evidence as to that is general rather than specific except in so far as Jackson's personal testimony is concerned, which you will recall. And the Government asks that you find from the evidence that this was a part of the whole scheme whereby profits were to be siphoned from Triumph to the key men, including this check particularly.

Then, the check mentioned in the third count of the indictment is this bonus check of \$5,000 paid on June 30, 1942, to V. G. Willis, Jr., one of the five key men, all of which was described in the evidence. The evidence does not show where Mr. Willis actually received this check, but it appears that he endorsed it. And the other endorsements on the back are: "Pay to bank, banking or trust [fol. 588] company. Farmers Trust Company of Newark, Delaware," and cleared, apparently, through the Philadelphia National Bank, and finally paid by the bank on which it was drawn, the People's Bank of Elkton.

The stipulation says as to that:

"The check described in the third count of the indictment was deposited by V. G. Willis, Jr., payee, in a bank account maintained by him, V. G. Willis, Jr., in the Farmers Trust Company of Newark, Delaware, and said bank in the usual course of business caused said check to be cleared by the use of the United States mails, and said check was in fact delivered by the United States mails to the Peoples Bank

of Elkton, Maryland, and was paid by said bank on July 9, 1942."

As I say, you must find, if you do find, beyond a reasonable doubt that these checks were mailed in furtherance of a scheme. Otherwise your verdict should be "not guilty."

Of course, it is conceivable that you may find that one of them was in furtherance of a scheme, the scheme mentioned in the Indictment, if you find there was such a [fol. 589] scheme to defraud, and the other not. In other words, you have two counts, the second and third. You may possibly reach the conclusion that the defendant is guilty on one count but not on the other. That is for you to determine.

Now, with regard to this letter attached to the stipulation, the defendant has asked for this instruction:

"The defendant prays the Court to instruct the jury that the letter referred to in the third paragraph of the stipulation has no probative force in determining whether or not the defendant mailed or caused to be mailed the checks mentioned in the second and third counts of the indictment."

That is correct law; and I so instruct you.

"The defendant prays the court to instruct the jury that the letter referred to in the third paragraph of the stipulation is not the mailing charge of the indictment and cannot be made the basis of a conviction."

That is also the law; and I so instruct you, as I said previously.

[fol. 590] Then I am asked generally to give you this instruction; and I so instruct you.

"If the jury fails to be satisfied by the evidence that the defendant, G. H. Kann, devised a scheme to defraud Triumph Explosives, Inc., and its stockholders in the Elk Mills Loading Company's transaction in the manner alleged in the indictment"—that is to say, if you fail to be satisfied beyond a reasonable doubt with the fact that there was a scheme to defraud and a use of the mails in furtherance of it—"then their verdict must be 'not guilty', even though they should find from the evidence that the

defendant committed other offenses against Triumph Explosives, Inc., or its stockholders."

That is to say, the defendant is being tried on the particular charge mentioned in the Indictment, and unless you are satisfied that the charge has been made out, you should acquit him, even though you are possibly not satisfied about other things in the case.

A man who comes into Court to be tried is tried on a specific charge in the particular indictment, and unless [fol. 591] the jury finds that that charge is made out he must be acquitted, even though it should happen in the course of the trial that it is found he committed some other offense.

However, in that same connection, gentlemen, I must say that on one of the issues in this case, whether there was a scheme to defraud, where the issue of good faith or bad faith, whether the Government offers evidence which tends to show that it was bad faith, where the defendant is a witness and denies that there was bad faith, you have the right to judge of the credibility and standing as to truthfulness and reliability of any witness in the case, and if anything you have seen or heard in this case from the evidence satisfies you that the testimony of any witness is unreliable, you can reject it. That is true not only as to witnesses for the defendant, but also witnesses for the Government, or any witness, including the defendant.

Is there anything else counsel would like to have me tell the jury?

Do you want to make any exceptions out of the presence [fol. 592] of the jury?

Mr. Sobeloff: I will be very glad to approach the Bench.

(Counsel for the respective parties then approached the Bench, after which the following occurred:)

The Court: Gentlemen of the jury, there are one or two supplemental things that counsel have called my attention to. I am asked to call your attention to the evidence in the case of Mr. Weil for the defendant, that in his experience it is business practice for attorneys for corporations in their offices to form subsidiaries at times, and to have common officers, and for the common officers to receive salaries from both corporations. That was some of the testimony given by Mr. Weil.

(The following occurred in chambers, without the presence and hearing of the jury:)

The Court: What is the exception you are now taking?

Mr. Sobeloff: Of course, I do not have the exact words before me, but, as I recall the Court's discussion of the [fol. 593] \$63,000 that was paid out in salaries and bonuses to officers and employees of Elk Mills, Your Honor said that there was no evidence that the \$63,000 was repaid.

I think it should be made clear that Your Honor is not ruling as a matter of law that that should have been repaid. It is certainly for the jury to determine whether it should have been repaid. And even if it should have been repaid it does not necessarily follow that it was fraudulent to pay them in the first instance.

The Court: I will say something on that.

Now, what else?

Mr. Sobeloff: In connection with the discussion of the capital expenditure limit I think it should be made clear that it does not follow even if the limit could have been raised, or even if another plan more advantageous to Triumph could have been effected, that this particular plan was necessarily fraudulent, because it was not the best plan.

The Court: All right. Now, what else?

[fol. 594] Mr. Sobeloff: There are just two more things, Your Honor. One is that Your Honor pointed out that there is no evidence that the key men had money to perform the contract. And in that connection there is testimony that the Government was advancing up to 30 per cent on contracts, and that these men were offering to handle it in that way.

The Court: I will not make any charge on that. If you want an exception on that, all right.

Mr. Sobeloff: All right, Your Honor.

Also, there is testimony that they could have gotten other jobs and the possibility that they would have gotten other jobs, which was a danger that the officers had a right to consider—the possible destruction of the business.

The Court: All right.

Now, what do you want to say, Mr. Paisley? Or have you something further, Mr. Sobeloff?

Mr. Sobeloff: Just one final thing. Your Honor failed to discuss—I don't know whether it was just an oversight

or not—the effect of the cashing of the two checks as bearing [fol. 595] on the question of the use of the mails for the purpose of effecting this scheme.

The Court: I do not want to say anything more on that. I think I covered that from both standpoints.

Mr. Sobeloff: An exception, if Your Honor please.

The Court: What do you want to say, Mr. Paisley?

Mr. Paisley: If you Honor please, I am just a little fearful that perhaps the jury does not understand clearly that if the defendant Kann was a party to the scheme to defraud, as alleged in the Indictment, he is bound by the acts of his co-schemers and co-defendants if they caused the use of the mails in the execution of that common scheme.

The Court: I certainly read that to them as you prepared it, but I will try to mention it again.

(The Court and respective counsel then returned to the Court Room, where the following occurred:)

The Court: Gentlemen, counsel on both sides have [fol. 596] asked me to say a few additional words about some particular matters in the summary of the evidence.

In the first place, with regard to the sixty-odd thousand dollars that was paid in salary and bonuses to the defendant and other persons by Elk Mills, I think I said that there was no evidence that it had been repaid; and that is not disputed by counsel. But I am asked to say to you, and I do say to you, that by making that reference to the evidence I am not undertaking to decide whether it should have been repaid or not. That is bound up very largely with the question of whether you find the scheme is one to defraud or whether it was a reasonable business proposition.

Then, again, I made some reference to the fact that if Triumph had to have some plan to avoid displeasing the bank, either that it had to have this particular plan or the fact that some other plan was necessary, it did not mean that the plan as adopted was necessarily a plan that was a scheme to defraud.

Then, of course, the other comment is equally applicable that it does not follow that because the best plan that could [fol. 597] have been devised was not devised, that the plan which was devised was fraudulent. The whole ques-

tion of whether the plan that was used here was a fraud or not is left to your unreservedly. I do not mean to express any opinion about it, and I do not mean to imply what your opinion should be on that point.

Then, with regard to the alleged threat of the key men to leave the employ and the fact that it did not appear from the evidence affirmatively, at least, that they had the capital or ability to carry through this big contract and, therefore, on the question of whether their threat was a bluff or was serious, I am asked to say that if the defendant believed that they would have quit and could have gotten other jobs that it would have been or might have been disastrous from his point.

Then I am asked to again say with regard to the mailing of these checks that although the defendant did not personally mail them, if he was a party to the scheme with others which involved obtaining the fruits of this scheme by the use of the mails and that some of the others, active [fols. 598-633] parties to the whole scheme, did the mailing, the defendant would be bound by that if the mailing was in execution of the scheme.

[fol. 634] · 18 UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

No. 5199

GUSTAV H. KANN, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the
District of Maryland, at Baltimore. Criminal

(Argued January 21, 1944. Decided February 4, 1944)

Before Parker, Soper and Dobie, Circuit Judges.

Simon E. Sobeloff (Bernard M. Goldstein on brief) for Appellant; and William A. Paisley, Special Assistant to the Attorney General, (Bernard J. Flynn, U. S. Attorney, and Ellis L. Arenson, Special Attorney, Department of Justice, on brief) for Appellee.

OPINION—Filed February 4, 1944

[fol. 635] DOBIE, Circuit Judge:

Gustav H. Kann (hereinafter called Kann) was, with several others with whom we are not now concerned, tried in the United States District Court for the District of Maryland under an indictment containing three counts for violations of the Mail Fraud Statute, 18 U. S. C. A. §338. Kann, found guilty and sentenced under the second and third counts, has duly appealed.

This appeal has raised many questions. Many of these questions are so lacking in substance that they require little or no notice. Into this category, we think, fall appellant's objections to the admission of evidence, to the instructions given by Judge Chestnut in the District Court, and to certain comments on the evidence made by Judge Chestnut to the jury. We proceed to discuss, then, the three most important questions in the case: was there substantial evidence to support the jury's finding (1) that the formation of the Elk Mills Loading Corporation (hereinafter called Elk Mills) was a fraudulent scheme; (2) that Kann had knowledge of, and participated in, the fraudulent scheme; (3) that Kann caused the mails to be used in furtherance of the fraudulent scheme.

(1) *The Elk Mills Loading Corporation.*

Triumph Explosives, Incorporated, (hereinafter called Triumph) had large contracts with the United States Government for the production of explosives. About 80% of the stock of Triumph was owned by numerous stockholders scattered over the country. Kann was President of Triumph, Joseph Decker was Vice-President of Triumph. These two men controlled and dominated its policies and [fol. 636] activities. Both were directors and among the other five directors of Triumph were a brother and a brother-in-law of Kann.

Triumph had borrowed substantial sums from certain banks. In connection with these loans, Triumph agreed to certain restrictions on the sums it could spend for either capital outlays or increased salaries for its employees. Kann strenuously insisted, and evidence was introduced to show, that the organization and the operations of Elk Mills was a legitimate business necessity, in the light of

these restrictions, in order that Triumph might duly carry out its large and important contracts with the United States Government. The theory of the prosecution was that the formation and operations of Elk Mills constituted a scheme and artifice to enrich Kann and his co-defendants by siphoning off funds in fraud of Triumph and its shareholders. Of course, the jury is the sole judge of the credibility of the witnesses, and the finding of the jury here that the organization and activity of Elk Mills was a fraudulent scheme is binding on us if this finding is supported by substantial evidence. We think that this finding is so supported.

It is sufficient, we think, to set out, without elaborate comment, some of this evidence. Triumph, whose stock was widely held, turned over to Elk Mills a million-dollar contract of Triumph with the United States Government. About 45% of the stock of Elk Mills was held by Kann's co-defendants, for which no payment whatsoever was made. Elk Mills was thus enabled to make a profit of almost \$300,000.00 in six months; and, in addition to their compensation from Triumph, Kann and his co-defendants received from Elk Mills about \$65,000 in salaries and bonuses. One of the bankers testified that every request from [fol. 637] Triumph to extend the limit for capital outlay and increases in salaries had been duly approved.

There was evidence to show that three of the seven directors of Triumph knew nothing of the Elk Mills scheme until Commander Seidman, of the Navy Department, uncovered the facts; that notice of the meeting of Triumph's directors did not, as Triumph's by-laws required, state the object of the meeting—the approval of the Elk Mills scheme; that the minutes of Triumph showed the presence of two directors at this meeting, when, as a matter of actual fact they were not present when the Elk Mills scheme was discussed, though they had been present at the earlier part of the meeting; that Triumph's employees and facilities had been freely used in the making of the products for which Elk Mills was paid; that Kann, his nephew, and Decker formed a majority of the Board of Directors of Elk Mills and dominated its activities. Three other bits of evidence may be mentioned in this connection. One is the letter of Kann's brother-in-law, A. Leo Weil, Jr., an attorney, sent to Kann. This clearly shows that Weil was

not pleased with many details in the Elk Mills picture. Then the jury might well have been impressed by the evidence as to the demeanor and bearing of Kann and his associates when discovery became inevitable. Finally, there was evidence of the admittedly unsavory plot involving the sale of the land and timber in connection with the Elk Mills scheme. Whatever effect may be analytically attributed to each of these (and other) incidents, the composite picture, viewed in its background, furnished adequate ground for the jury's determination that the Elk Mills device was conceived in sin and born in iniquity. [Vol. 638] There was ample evidence here of many of the so-called badges of fraud.

(2) *The Guilty Knowledge of Kann.*

Counsel for Kann, on oral argument, earnestly contended that there was no substantial evidence to justify the finding by the jury that Kann had knowledge of, or participated in, the fraudulent aspects of the Elk Mills device. With this, we cannot agree. If, as the jury found upon substantial evidence, the Elk Mills scheme was fraudulent both in its inception and in its execution, the whole picture is utterly inconsistent with any idea that Kann's relation to the fraudulent scheme was merely that of an innocent bystander.

We could predicate our holding here, without any necessity for comment, upon what we have said on the preceding contention. We, however, summarize or enumerate some of the more salient features which give validity before us to the jury's finding that Kann both knew of, and took an active part in, the fraudulent Elk Mills transactions. Kann and Decker dominated both Triumph and Elk Mills; Kann was a director of both corporations, the President of one, Vice-President of the other. He expected to profit personally, and did profit personally, through the Elk Mills scheme, at the expense of the shareholders of Triumph. Even if he were innocent before, (an assumption which we think is utterly without warrant), the Weil letter must have put him on notice. It would be indeed strange to presume that he was ignorant of the deficiency in the notice calling the meeting of the Board of Directors of Triumph to consider the Elk Mills proposition, the absence of the two directors when the Elk Mills transaction was discussed,

[fol. 639] though these directors had been present at the first part of the meeting, and the consequent falsification of Triumph's minutes and the fact that his co-defendants (the so-called key men who were so essential to Triumph's war contracts) paid nothing for their stock in Elk Mills. Hardly, too, could Kann have been ignorant that while a major share of the profits was siphoned off by the Elk Mills conspirators, a large part of the work was done by the employees, and with the facilities, of Triumph. And not without significance is the evidence of Kann's demeanor and actions when the investigators of the Navy Department let the cat out of the bag.

(3) *The Use of the Mails.*

Finally, there is the contention that Kann could not be charged with the use of the mails in furtherance of the fraudulent scheme. Kann is bound by the acts of his fellow conspirators done within the scope of the conspiracy, *Preeman v. United States*, 244 Fed. 1; *Ader v. United States*, 284 Fed. 13; *Tincher v. United States*, 11 F. (2d) 18; *Meckett v. United States*, 90 F. (2d) 462. The fraudulent use of the mails was predicated upon the cashing of checks by Kann's co-defendants. The check which formed the basis of the second count in the indictment was a check of the contractor, Jackson, drawn upon a bank at Wilmington, Delaware, and cashed at a bank in Elkton, Maryland. The check forming the basis of the third count was drawn on a bank at Elkton, Maryland, and was cashed by Willis at a bank in Newark, Delaware. If, as we have indicated, Kann is held responsible for the acts of his associates in cashing these checks, we think the jury was justified in finding that Kann was a party to the mailing of these checks [fols. 640-641] by the bank which cashed them, to the bank on which the checks were drawn.

This question was discussed by us at some length in our opinion (handed down January 21, 1941) in No. 5175, *Decker v. United States*. Incidentally, Kann was a co-defendant in that case. We think it is unnecessary to add anything here to what was said in that opinion, in Judge Parker's opinion in the *Tincher* case, *supra*, and in Judge Chesnut's opinion in the *Decker* case in the District Court, 51 F. Supp. 15. We might remark that here, as there, substantial evidence indicated that the conspiracy was a continuing one. That the parties to the instant case contemplated a rather

extensive use of the mails is shown by the letters sent to the Postmaster at Elkton, Maryland, asking that all mail for Elk Mills be placed in the post-office box of Triumph.

The judgment of the District Court is affirmed.

Affirmed.

[fols. 642-646] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

No. 5199

GUSTAV H. KANN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the
District of Maryland

JUDGMENT—Filed and Entered February 4, 1944

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

John J. Parker, Senior Circuit Judge. Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

[File endorsement omitted.]

On another day, to-wit, February 12, 1944, petition of appellant for a stay of the mandate is filed.

[fol. 647] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 10, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 648] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTED RECORD—Filed June 15, 1944

It is hereby stipulated and agreed by and between the attorneys for the respective parties that for the purpose of review by this Court on certiorari the printed record shall consist of the entire typewritten transcript of record certified by the Clerk of the Circuit Court of Appeals for the Fourth Circuit and now on file in the office of the Clerk of this Court, omitting, however, the following:

All portions already marked out in the transcript.
All handwritten notations of exceptions.

Pages 7 : 1-4. Omit entirely.

16-18. Omit entirely.

20-34. Omit entirely.

39. "Mr. Paisley" (line 9) to court's remark ending with "record."

51. Lines 3 to 5 and last 2 lines.

52. Lines 11 to 19.

[fol. 649]

53. Last 7 lines.

54. First 3 lines and last 3 lines.

55. First 3 lines.

63. Last 3 lines.

66. Last line.

67. Entire page.

* Page references are to the numbers at the bottom of the pages of the transcript.

- 68. First 5 lines.
- 75. First 11 lines.
- 79-82. Last question at bottom of page 79 to end of page 82.
- 83. Line 1 and lines 3 to 8.
- 86. Line 6 "Mr. Soboloff" to line 15 "yes."
- 92. Last 2 lines.
- 93-109. Omit entirely.
- 110. All except last 2 lines.
- 116. Last 8 lines.
- 117-118. Omit entirely.
- 119. All except last 3 lines.
- 120. Lines 11 to 16 and last 4 lines.
- 124. All except first 4 lines.
- 125. Last 10 lines.
- 126. First 2 lines and last 10 lines.
- 127. All except last 6 lines.
- 138. Lines 2 to 7 and 9 to 13.
- 139. Line 17 "The Court" to line 20 "Mr. Paisley."
- 140. Line 6 "Mr. Soboloff" to next to last line.
- 141. Lines 4 to 10.
- 169. Last 4 lines.
- 170. Entire page.
- 171. First 2 lines and lines 7 to 11.
- 176. Last 5 lines.
- 177. First 2 lines and last 4 lines.

[fol. 650]

- 183. Lines 7 to 11.
- 184. Last line.
- 185. First 3 lines and last 9 lines.
- 186. All except last 15 lines.
- 187. Entire page.
- 188. First 9 lines.
- 192. Print the portion at the bottom of this page that was previously marked out.
- 197. Last 4 lines.
- 198. Last 6 lines.
- 199. Last 9 lines.
- 200. First 13 lines.
- 200 J. Last line.
- 219. Last 8 lines.
- 220. First 2 lines.
- 254. Last 6 lines.

- 255. First 7 lines and lines 12 to 15.
- 256. Last 6 lines.
- 257. First 6 lines.
- 265. Last line.
- 266. First 12 lines.
- 274. Lines 9 to 12.
- 276. Lines 2 to 4.
- 287. Entire page.
- 297. From line 9 to end of page.
- 344. Last 7 lines.
- 345. First 12 lines.
- 348. Last 4 lines.
- 349. All except first 2 lines.
- 350. Entire page.
- 354. Last 10 lines.

[fol. 651]

- 355. Last line.
- 356. First 11 lines.
- 360. Lines 11 to 18.
- 363. Last 6 lines.
- 364. First 13 lines and last 5 lines.
- 365. First 5 lines.
- 369. All except first 3 lines.
- 370. First 9 lines.
- 371. Last 2 lines.
- 372. First 6 lines.
- 380. Line 3 to next to last line.
- 383. Omit entirely.
- 389. Lines 15 to 20.
- 397. Line 11 "Mr. Soboloff" to line 15 "exception".
- 399. Entire page.
- 400. Entire page.
- 401. First 2 lines and lines 12 to 16.
- 435. Lines 8 to 15.
- 443. Line 10 "how much" to line 16 "Mr. Paisley".
- 445. Line 4 "the court" to line 10 "Mr. Paisley".
- 455. Last line.
- 456-473, inclusive. Omit entirely.
- 474. First 14 lines.
- 475. Last line.
- 476-492, inclusive. Omit entirely.

- 493. First 3 lines and last 14 lines.
- 494. First 2 lines.
- 498. Lines 2 to 9 and 11 to 13.
- 499. Line 6 "the witness" to line 13 "it would be".

[fol. 652]

- 504. Line 4 "The Court" to line, 10 "Mr. Soboloff".
- 513. First 13 lines and last 3 lines.
- 515. All except first 2 lines.
- 516-523, inclusive. Omit entirely.
- 524. First 9 lines.
- 545. All except first 2 lines.
- 546. Omit entirely.
- 547. Omit entirely.
- 548. Last paragraph.
- 549. All except noting of exceptions.
- 598. All except first 3 lines.
- 599-633, inclusive. Omit entirely.
- 643-646, inclusive. Omit entirely.

It is further stipulated and agreed that either of the parties hereto may refer in his brief to the entire transcript of the record and the exhibits filed in the office of the Clerk of this Court.

Simon E. Sobeloff.

Dated: June 10, 1944.

Bernard M. Goldstein, Attorneys for Petitioner.

Dated: June 7, 1944.

Charles Fahy, Solicitor General of the United States.

June 14, 1944.

[fol. 653] [File endorsement omitted.]

Endorsed on cover: File No. 48,252. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 35. Gustav H. Kann, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed March 4, 1944. Term No. 35, O. T., 1944.

FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1943

No. 

35

GUSTAV H. KANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION OF GUSTAV H. KANN FOR A WRIT OF
CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT
AND BRIEF IN SUPPORT THEREOF.**

SIMON E. SOBELOFF,
BERNARD M. GOLDSTEIN,
Attorneys for Petitioner.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. _____

GUSTAV H. KANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION OF GUSTAV H. KANN FOR A WRIT OF
CERTIORARI TO REVIEW A JUDGMENT ENTERED
FEBRUARY 4, 1944, BY THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT, AFFIRMING A SENTENCE OF CON-
VICTION ENTERED OCTOBER 30, 1943, BY
THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MARY-
LAND UNDER TWO COUNTS OF AN
INDICTMENT CONTAINING
THREE COUNTS.**

OPINION BELOW.

There was no opinion in this case by the United States District Court for the District of Maryland. The opinion dated February 4, 1944, by the United States Circuit Court of Appeals for the Fourth Circuit has not been reported but is contained in the Record, pages 214-218.

JURISDICTION.

The jurisdiction of this Court to issue a writ of certiorari to review the judgment of February 4, 1944, by the Circuit Court of Appeals for the Fourth Circuit is invoked under Sec. 240 of the Judicial Code as amended (28 U. S. C. A. 347). See also Rule 38 of this Court, 28 U. S. C. A., following Sec. 354 and Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

FEDERAL STATUTE INVOLVED.

The Federal Statute involved is Section 215 of the Criminal Code (18 U. S. C. A., Sec. 338):

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

QUESTIONS PRESENTED.

I. Whether the constitutional and statutory rights of this petitioner are not infringed by a conviction under Section 215 of the Criminal Code, (Title 18, Section 338, U. S. C. A.) of using, or causing the mails to be used to defraud, when the evidence shows that the only use of the mails was by banks which, after cashing certain checks, mailed them to obtain reimbursement.

II. Whether the constitutional rights of this petitioner under the Fifth Article in the Bill of Rights to the Constitution of the United States are not infringed when the evidence of fraud was more consistent with innocence than with guilt.

Although we recognize that ordinarily this Court will not review questions of evidence, the petitioner's innocence is so plainly consistent with the proof as to call for review. To this we may add that the opinion of the court below undertakes no reasoned analysis of the parts of the evidence which are claimed show fraud, but baldly adopts the government's contentions without in any way mentioning, let alone discussing, other substantial and uncontradicted testimony which, if it did not entirely remove all these contentions from debate, certainly showed that they were in harmony with innocence. Some of the evidence gave rise to suspicion in a few instances but even this was dispelled when all the proof was in. For this reason we have felt constrained to make a detailed narration of the facts as established by the evidence in the Record. It is earnestly submitted that a fair examination will demonstrate that the government failed to prove any fraud to which the petitioner was a party.

STATEMENT OF THE CASE.

The Indictment and Proceedings Below.

The petitioner is one of eight defendants who were indicted on February 16, 1943, charged with using the mails in a scheme to defraud (Criminal Code, Section 215, U. S. C. A., Title 18, Sec. 338). The indictment is in three counts. Each count alleged the same fraudulent scheme and the mailing of different checks was made the basis of each count.

Briefly, the scheme alleged consisted in the subcontracting by Triumph Explosives, Inc. of government contracts to Elk Mills, a subsidiary, with the intention that a large part of the profits should be distributed to the defendants through salaries, dividends and bonuses. The indictment further alleged the mailing of separate checks, one of which was set forth in each of the counts, for the purpose of executing the scheme. The petitioner pleaded "not guilty" and the other defendants, "nolo contendere".

When all the testimony was in, the petitioner requested the trial judge to instruct the jury to return a verdict of "not guilty" because the evidence showed the mails were not used for the purpose of executing the schemes alleged, and because the evidence was legally insufficient to prove the petitioner's fraud. These requests were refused and exceptions were duly noted.

The first count was abandoned at the trial and the jury returned a verdict of "guilty" on the second and third counts. On October 30, 1943, the District Court entered its judgment that the petitioner be imprisoned for a period of three years and pay a fine of \$2,000 and costs. An appeal was filed in the Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of conviction on February 4, 1944.

*The Mailing of the Checks Upon Which
the Indictment Was Based.*

The check described in the second count of the indictment was a check of the Elk Mills Loading Company, drawn on the corporation's Elkton bank in payment of a bonus to one of the company's consultants, V. G. Willis. This check was carried by Willis to Newark, Delaware, where it was unqualifiedly endorsed or cashed by him at his Delaware bank. The bank in turn, to reimburse itself, mailed the check to the bank at Elkton. The second count is predicated upon this mailing by the Newark bank.

The mailing involved in the third count was the mailing of a check of the contractor Jackson, made payable to the five key men hereinafter identified (of whom the petitioner was not one). This check was cashed at the Elkton bank and in turn mailed by the Elkton bank to the bank upon which it was drawn at Wilmington, Delaware, to reimburse itself.

As is hereafter shown in the brief, assuming a fraudulent scheme existed, these mailings would not constitute a violation of the mail fraud statute under the decisions in the Fifth and Tenth Circuits but only in the Fourth Circuit.

History of Triumph Explosives.

Triumph Explosives, Inc., a corporation located at Elkton, Md., was originally a comparatively small company engaged in the manufacture of fireworks, fuses and signal lights. With the outbreak of war in Europe the company began to receive contracts from various governments for munitions, and after the United States became involved in the war these contracts rapidly swelled in number so that the Government of the United States became the company's principal customer.

Mr. Gustav H. Kann, of Pittsburgh, Pa., the petitioner, was the president of the company. His duties consisted chiefly in looking after financing. He had nothing to do with matters of production, plant expansion, building (R. 177),* or the securing of contracts, although in a general way he knew of the workings of the company. The actual operation of the production units was under the supervision of Mr. Joseph B. Decker, the vice-president and production manager, who resided at the corporation's place of business in Elkton, Md.

The Key Men.

Connected with the company since its inception (R. 408) were certain individuals, referred to throughout the Record as "key men," Feldman, Präl, Willis, Deibert and William L. Kann, Jr. (the last named being a nephew of the petitioner) who through practical experience and application had acquired "know how" in the manufacturing of explosives (R. 367), and held highly important positions in the company** (R. 408). As the profits multiplied these men increasingly manifested signs of dissatisfaction (R. 408) with the amount of their remuneration (R. 363, 5, 7). Due to the great dearth of men skilled in the explosives field (R. 367), it would have been an easy matter for these men to make connections with other companies engaged in manufacturing explosives. (R. 367, 8) and their leaving would have been very damaging to this company which was deeply immersed in an ever-growing backlog of Government orders for munitions (R. 412).

* Unless otherwise noted, references are to the record from the Circuit Court of Appeals below which has been filed in this Court.

** The designation "key men" used hereafter refers solely to these individuals and does not include the petitioner.

***Loan Agreement With Banks—
Limitation on Capital Expenditures.***

The corporation had a loan agreement with the People's Pittsburgh Trust Company of Pittsburgh and the Federal Reserve Bank of Cleveland, which prohibited the company from making investments in capital assets, that is, in land, buildings, and equipment, beyond certain stipulated sums; and it also was limited in increasing salaries of employees beyond a certain point, without prior approval of the banks. The principal reason for the limitation on capital expenditures was the desire of the banks to assure that the loan be susceptible of easy liquidation on maturity (R. 277). The banks did not want more than the stated amount to be expended for plant expansion since this would render liquidation of the loan very difficult, if not impossible. The agreement contained a clause by which the limitation on capital expenditures could be raised after application and approval by the banks.

The original limitation was for \$160,000 in capital expenditures and ran from August 1, 1940, to March 1, 1942 (R. 289). It was amended on August 14, 1941, by increasing the limitation to \$240,000 but the period during which the permissible expansion in capital assets could be made again started from August 1, 1940, and ran to September 15, 1942 (R. 290). The limitation extended to all expenditures for capital assets during the entire period between the dates mentioned (R. 290, 291).

The Incendiary Bomb Contract.

In the latter part of 1941, the Chemical Warfare Service of the United States Government requested the company to bid on the manufacture of incendiary bombs, an entirely new product. Its manufacture entailed hazardous work and it was not known at the beginning what profit, if any, could be made (R. 417, 419); nor was there

any accurate gauge by which the cost of producing the bombs could be measured. At first it was felt that such a contract would be an undesirable one for the company and a high bid was purposely submitted (R. 358), but, as the Government urged the company to bid, a bid more in line with the estimated cost of the manufacture of this product was later made, and on November 27, 1941 (R. 359), a contract was awarded the company for 3,800,000 incendiary bombs at 39.78 cents per bomb, totaling roughly \$1,500,000 (R. 369). All the negotiations leading up to this contract were carried on by the key men of the company and Mr. Decker, the operating vice-president (R. 358, 359). The petitioner, whose duties did not include negotiating for contracts, had no part in these negotiations and did not know that a contract had been awarded until later (R. 360, 390, 407), although he did know in a general way that negotiations were going forward concerning incendiary bombs (R. 409).

Feldman Memorandum—Elk Mills Created.

On December 3, 1941, a memorandum was handed to the petitioner, signed by S. M. Feldman, one of the key men (R. 405; 6). Although the petitioner had heard talk of separate companies for doing certain work (R. 405), this was his first specific knowledge of any plan for the creation of Elk Mills (R. 405). The paper gives the background of the contract and states the initial unwillingness to bid on the contract but asserts that later the key men requested Decker to bid (R. 358), with the understanding that, upon receipt of the contract it would be sublet to a new company which would perform all the work called for by the contract (R. 358) and would agree to pay a 10% profit on the face amount to Triumph (R. 358). The paper made known to the petitioner for the first time (R. 407) that a contract had been entered into between the War

Department and Triumph for the manufacture of incendiary bombs; that a corporation known as Elk Mills Loading Corporation had already been formed for the purpose of carrying out the contract (R. 359); that the costs of incorporation had been paid for by Mr. Feldman (R. 359); and called for a division of the stock of the newly-formed company equally among the several key men, the petitioner, and Decker (R. 359). The memorandum further stated: "The plant has been laid out and construction is to start very shortly."

*More About the Limitation on
Capital Expenditures.*

In order that what followed may be understood in its proper perspective, a little more must be said about the situation then prevailing with respect to the limitation on capital expenditures. On November 28, 1941, approximately a week prior to Mr. Kann's receipt of Mr. Feldman's memorandum, the limitation had been raised to \$300,000, again including all capital expenditures theretofore made from August 1, 1940, to September 15, 1942 (R. 290, 291). This last increase was necessitated by the banks' discovery on November 19, 1941, that Triumph had already exceeded the previous \$240,000 limitation (R. 291, 2). Triumph's explanation was that in considering the sum laid out for capital expenditures they figured on the net sum invested after depreciation, but the banks insisted that the limitation referred to the gross amount invested in capital assets (R. 293). Since Triumph, under the banks' interpretation, had already exceeded its authorization and since the breach was a technical one (R. 293), the limit was raised to \$300,000, but the corporation was warned to "watch its step" (R. 411) and to be very careful not to expend more than the authorized amount in capital assets (R. 293).

Although the limit was thus raised to \$300,000 because, according to the Banks' computation the company had already expended over \$293,000 in capital assets (R. 281), only the difference, approximately \$6,200, was therefore actually available for capital investment on all the contracts of the company (R. 281) for a period of several months (R. 412), and on this occasion the Federal Reserve Bank in a letter to the People's Pittsburgh Bank stated, "we must insist that they keep within the limitation of \$300,000" (R. 293).

The entire history of the Loan Agreement was marked with great difficulty for the corporation for the banks took a very rigid view of the provision dealing with capital investments, and on many occasions the corporation was made to know, in no uncertain terms, that the banks would not tolerate larger investments in capital assets than permitted by the agreement (R. 410, 411); and efforts to obtain the banks' permission to increase the authorized capital expenditure invariably met with great resistance on the part of the banks (R. 410, 411).

Improbability of Banks Permitting Triumph to Make Necessary Expenditures.

Since the incendiary bomb contract required capital expenditures of between \$200,000 and \$250,000 (R. 269), and in view of Triumph's unfavorable standing with the banks at this time (R. 413) and the great difficulties experienced on former occasions in securing permission to spend comparatively trivial sums (R. 375, 6, 410, 411), it was felt it would be useless to request the banks to permit such a large outlay in capital assets (R. 366, 391, 375, 413). And even if the government advances on the contract were used for capital assets, both the petitioner and Mr. Weil, the company's counsel, who dealt with the banks, believed such use would likewise violate the Bank Agreement (R. 414).

The Dilemma.

The company was thus in the unfortunate position of having a contract with the War Department for vitally needed munitions which it could not fulfill because the banks would not sanction the necessary capital expansion (R. 371, 375). Aside from the natural patriotic desire to furnish the War Department the sorely needed munitions, on purely business grounds the company could not afford to breach the contract and thereby expose itself to ruinous litigation (R. 371) or, at best, antagonize its chief customer, the Government of the United States. Nor could it proceed with the contract without violating its agreement with the banks (R. 370, 371, 412, 413).

Proposal to Resolve Dilemma by Using Elk Mills.

When the petitioner received Feldman's memorandum he consulted Mr. Weil (R. 356), general counsel of Triumph. Mr. Weil was critical of the proposed plan and the petitioner requested him to attend a board meeting of Triumph at Elkton on December 11, 1941 (R. 361). Mr. Weil did so, and at this meeting it was explained that the performance of the contract would necessitate the expenditure of large sums in capital assets (R. 41), and since the banks had indicated their unwillingness to assent to such further capital expenditures (R. 41), and in order to carry out the contract and satisfy the demands of the key men for greater remuneration (R. 42), it was proposed that the contract be sublet to Elk Mills Corporation and if the government would advance sums to Triumph on the contract, Triumph would in turn make advance payments to Elk Mills to acquire the necessary equipment and machinery (R. 43).

Under the arrangement, the five key men were personally to pay for and acquire suitable land (R. 44) for the erection of a plant and to transfer this land to Elk Mills.

In return they were to receive 45% of the stock of Elk Mills (R. 44); the remaining 55% of the stock was to be owned by Triumph.

The parent corporation was to purchase the equipment and supplies and charge the sums paid out to Elk Mills (R. 44, 45, 422) and was to receive a flat 10% profit on the face amount of the contract, with Elk Mills performing all the work (R. 44).

Approval by Board of Directors.

This proposal was approved by the Triumph's Board of Directors, at a meeting dated December 11, 1941, pursuant to the customary broad notice, but was expressly made "subject to the People's Pittsburgh Trust Company and Federal Reserve Bank of Cleveland having no objections thereto" (R. 45, 46).

Proposed Plan Laid Before Banks.

On returning to Pittsburgh Mr. Weil, in accordance with the proposal, contacted Mr. Lucas, the vice-president of the People's Pittsburgh Bank, to lay the plan before him and determine whether the banks had any objections to the plan. Mr. Lucas asked Mr. Weil to submit the proposal in writing and on December 15, 1941, Mr. Weil had a personal interview with Mr. Lucas and submitted to him a letter, dated the same day (R. 258, 259), which detailed the arrangement Triumph proposed to make (R. 267-272), as explained above, in order to carry out the incendiary bomb contract. Mr. Lucas felt that he should consult the officials of the Federal Reserve Bank of Cleveland and, accordingly, he and Mr. Weil went to Cleveland and had a conference with the managing officials of the Federal Reserve Bank in that city (R. 261). The letter that Mr. Weil had prepared for Mr. Lucas, setting forth the proposed plan, was taken along and was carefully pondered not only by

the officials of the banks but by their counsel (R. 261). In a part of this letter it was explicitly stated:

... in view of the foregoing situation,—first, the refusal on the part of the banks to permit Triumph to expend approximately \$200,000 additional for capital assets" . . . etc.

Approval by Banks.

After considerable study, the banks stated that they had no objection to the proposed plan. The banks knew that by authorizing Triumph to make the capital expenditure in the required amount the entire plan to form a new corporation would become unnecessary, but not once was this suggested by the banks (R. 266).

Plan Put Into Effect; Elk Mills Model Plant.

The plan was then put into operation, except that the petitioner was not to receive any stock in the new company, contrary to the informal proposal in the Feldman memorandum; and in fact the petitioner received no stock. Elk Mills Loading Corporation became a model plant for the manufacture of incendiary bombs. Ingenious techniques to facilitate the loading operations and other time-saving features were devised by the key men (R. 417, 418). It was the finest plant of its type in the country (R. 419) and soon began to produce ahead of delivery schedule on this new explosive.

Shirley and MacBride Testimony.

These men were directors of Triumph. They were both present at the board meeting dated March 17, 1942, in which the minutes disclosed a discussion of Elk Mills. They both said they heard no talk of Elk Mills at that time and did not know of this corporation until October 1942. However, a resolution which they inserted in the minutes

of October 7, 1942, shows that they left the March 17th meeting before the Elk Mills discussion (R. 62).

The evidence further showed that it was extremely difficult to get them to attend meetings and that they were present at only one other meeting besides that of March 17, 1942 (R. 77-78). These directors had free access to the minutes of all meetings and could easily have acquainted themselves concerning all previous happenings at the meetings they missed. A bit of evidence showing the complete lack of secrecy about Elk Mills was furnished by the government's witness, Forestell, who testified, without contradiction, that the name Elk Mills was at all times painted in large letters on a door in the main corridor of the Triumph office building (R. 505).

Inter-Company Accounts Accurately and Properly Kept—Triumph's Profits.

Witness Oldham, the representative of the F. B. I. in charge of this investigation, stated that the inter-company accounts between Triumph and Elk Mills were at all times treated properly and accurately (R. 333, 336). The Elk Mills profit and loss statement up to July 31, 1942, showed a profit, after salaries to officers and consultants, of \$219,000 (R. 316) and the profits were put into fixed assets (R. 317). Triumph, in accordance with the agreement, paid all expenditures for Elk Mills, and billed Elk Mills for the sums laid out (R. 318), and on the overhead expenses, by a supplementary agreement, Triumph charged Elk Mills 5¢ per bomb. Under this arrangement the profits to Triumph were as follows:

55% (due to ownership of that proportion of Elk Mills stock) of the profit of \$219,000 made by Elk Mills (R. 336).

10% on the face of the contract, amounting to approximately \$61,000 (R. 337).

Triumph also received the 5¢ per bomb, above mentioned, totaling \$80,000, for services rendered to Elk Mills, such as watchmen's services, office rent, secretarial expenses, etc. (R. 425). This resulted in a profit to Triumph of some \$40,000 since the total actual cost of providing these services was approximately \$40,000 (R. 426).

Petitioner's Earnings.

The petitioner was made vice-president of Elk Mills. His duties pertained to administrative matters (R. 437) and efforts to secure independent financing and banking accommodations for the subsidiary (R. 438). For his services to Elk Mills he received \$3,033.34 in salary and \$5,000 in bonus (R. 437). A similar bonus was declared by the Elk Mills Board of Directors on May 27, 1942, to each of its officers and technical advisers (R. 213, 217). One of these bonus checks to V. G. Willis, Jr., a consultant, is the basis of the third count. The petitioner's total earnings from Elk Mills were \$8,033.34; his earnings from Triumph were merely nominal, totaling only \$1,050 (R. 382).

Defect in Title Prevents Consummation of Land Purchase for Elk Mills.

It will be recalled that the key men were to purchase a suitable site for the buildings of Elk Mills, and, as the consideration for their transferring the land, received 45% of the stock of Elk Mills. It developed that there was a flaw in the land title (R. 500, 501) which necessitated court action (R. 504) and consequent delay. Meanwhile, Triumph had taken the contract for the land in order to protect its rights to a waterway (R. 499, 503). The petitioner, on his periodic visits, made repeated inquiries of the key men as to why the land had not been paid for and was from time to time informed that they were ready to pay for the land (R. 421) but that the settlement had been held up

because of the defect in title which had to be removed before the transaction could properly be completed (R. 421, 500).

The Lumber Deal.

During the latter part of August, 1942, when the Government began an examination of Triumph for the purpose of price renegotiation, the petitioner learned for the first time (R. 420) about the so-called "lumber deal". It appears that Stephen R. Jackson was the contractor who did construction work both for Triumph and Elk Mills (R. 139, 141). Messrs. Feldman and Deibert (R. 142-4), two of the key men, instructed him to use certain timber on the Elk Mills tract in constructing the buildings of that corporation. After Mr. Jackson finished work on these buildings he was told by W. L. Kann, Jr. (not the petitioner), that the timber belonged to the five key men, Feldman, W. L. Kann, Jr., Deibert, Prial and Willis, and was given a bill for \$12,062.18 for the timber (R. 154). When, contrary to his understanding, Mr. Jackson found that he had to pay for the timber, he in turn billed Triumph in the same amount and received a check of Triumph for that amount (R. 158). Jackson then gave his check in like amount to the five key men. The net effect was that money of Triumph was improperly appropriated by the key men. This check is the basis of the third count.

When this transaction for the first time came to the petitioner's attention in the latter part of August, 1942 (R. 420) he promptly said that it was all wrong (R. 238, 244); that he disapproved of it; and that he would see to it that the matter was straightened out by requiring the key men to pay back the sums they had received (R. 244, 432). And the money was paid back (R. 339, 432).

The petitioner had no part in these dealings with Jackson (R. 177) and he never received any part of Jackson's check

to the key men (R. 153). However, Jackson testified that on the occasion when he received Triumph's check for \$12,062.18 on July 21, 1942, he had discussed the matter with W. L. Kann, Jr., in the latter's office in the Triumph Building, and on coming out of the office (R. 184) they met the petitioner walking down the corridor (R. 184). W. L. Kann, Jr., in Jackson's presence, asked the petitioner, "... if it was all right to pay the bill" (R. 161) (later the witness used the words "lumber bill" and "lumber account"), the petitioner replied, "I don't see why not" and walked on (R. 184). There was no explanation or discussion (R. 184) and the conversation consisted solely of the single question and answer and lasted "possibly a few seconds" (R. 179). The witness' recollection as to whether his bill was at hand during the conversation varied, but his last testimony on this was that it was not present (R. 181, 163, 172). The petitioner, as previously stated, had nothing to do with construction generally or with the construction of the Elk Mills buildings specifically (R. 177), nor did his duties include looking after the payment of bills (R. 177). He knew that Jackson was the builder (R. 165); that as such Jackson was entitled to be paid in instalments from time to time (R. 433); and that some of Jackson's bills *were for lumber purchased on the outside* (R. 165, 433).

The petitioner had no recollection of this conversation (R. 428). He denied that he was in Elkton on July 21st, the date when the conversation is supposed to have occurred, and on the 22nd (R. 428), the date of Jackson's bill. His recollection was confirmed by copies of letters from his file rushed to Baltimore during the trial from the petitioner's office in Pittsburgh, which showed that he was in Pittsburgh (R. 431) and had written letters transacting business in that city on those dates (R. 431, 432).

After the ramifications of this transaction were made known to the petitioner, and since the key men had not as yet paid for the land, they were required to turn back to Triumph the 45% stock of Elk Mills which they held, thus making Elk Mills a wholly owned subsidiary. Thus, no loss to Triumph resulted from the lumber deal.

SPECIFICATION OF ERROR TO BE URGED.

The Circuit Court of Appeals erred in failing to hold:

(1) That the District Court for the District of Maryland erred in refusing to instruct the Jury that their verdict should be "Not Guilty" because the uncontradicted evidence showed that the schemes alleged were completely consummated before the mails were used and, therefore, the mails were not used for the purpose of executing said schemes.

(2) That the District Court for the District of Maryland erred in refusing to instruct the Jury that their verdict should be "Not Guilty" because the evidence was legally insufficient to prove fraud on the part of the petitioner.

REASONS FOR GRANTING WRIT.

I. Conflict of decisions of Circuit Courts of Appeals.

The Circuit Court of Appeals below decided that where a check obtained by fraud is cashed by a bank and the bank then mails the check for its own reimbursement, there is a use of the mails within the prohibition of the statute. The Court held that the fraud was not complete until the check cleared and was paid by the bank on which it was drawn. This ruling is in direct conflict with that of the Circuit Court of Appeals for the Fifth Circuit in *Stapp v. U. S.*, 120 F. (2d) 898 (1941), in which the court decided that where a check secured by fraud is cashed and

the schemer receives the proceeds the scheme is at an end, and the later mailing of the check by the cashing bank to obtain reimbursement is not in furtherance of the scheme. The irreconcilability of that conflict is illustrated by excerpts from the opinions.*

Present Case, C. C. A. 4

"The indictment charged a scheme to defraud Triumph, and Triumph was not defrauded, i. e., suffered no economic detriment, until the check had been received through the mail by the Pittsburgh Bank and had been charged against Triumph's account in that bank. Thus, the complete and final success of the fraudulent scheme required the use of the mails for its ultimate successful consummation."

Stapp Case, C. C. A. 5

"... it is apparent the purpose of the scheme to defraud Christian [the victim] had been completely accomplished when the Pauls Valley Bank accepted his check on the Tyler Bank and the money was paid to Rudder. Christian was then and there defrauded. Up to that point the mails had not been used at all. Christian could not have legally done anything to stop payment of his check and was obligated to reimburse the Pauls Valley Bank for cashing it. While the mails were incidentally used, the defendants had no interest whatever in that transaction."

In the present case, the sole object of the scheme, the money, was obtained before the mails were used. It is, therefore, difficult to understand why the court below in-

* In the present case, the Court below did not discuss the mailing feature at any length but referred to its decision in *Decker v. U. S.* (No. 5175), a companion case, as embodying the view of the Court. The quotation used is, therefore, that of the Decker case.

sists that the success of the scheme required the use of the mails.

The Court in our case also overlooks that Triumph was damaged beyond recall when the banks cashed the checks. The holding that no economic loss resulted until the checks were charged against the company's account conflicts with the Uniform Negotiable Instruments Act as interpreted by the Courts of Maryland, where the offense is alleged to have been committed.* The banks were holders in due course after cashing the checks and therefore payment could not be stopped against them.

The reasoning in the *Stapp* case has been adopted and approved in *U. S. v. McKay*, 45 F. Supp. 1001, which was decided by the District Court for the Eastern District of Michigan in July, 1942. The same question was presented. Said the Court in that case at page 1006:

"Under the authorities above referred to, and with particular reliance upon the recent decision of the Circuit Court of Appeals for the Fifth Circuit in *Stapp v. United States*, supra, the Court holds that the subsequent mailing of the check by the bank in question in order to reimburse itself for the funds it had paid out does not constitute a mailing in furtherance of the scheme charged in the indictment, and that the demurrers to the two counts of the indictment should be sustained."

In *Dybre v. Hudspeth, Warden*, 106 F. 2d 286 (10 C. C. A.), the question was also presented and the Court ruled that a use of the mails by a cashing bank to obtain reimbursement is not in furtherance of the scheme since the

* Article 13, Sec. 76 of the Maryland Code provides: "A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument in the full amount thereof against all parties liable thereon. See *Dean v. Eastern Shore Trust Company*, 159 Md. 213 (1930)."

scheme was at an end when the schemer received the merchandise which was the object of the artifice:

"... the charge clearly shows that the U. S. mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until after the defendant had induced the parties named to accept his fraudulent check for merchandise. He had thus accomplished all he set out to do in falsely representing that he had money on deposit in the banks."

II. The Court below interpreted the Mail Fraud Statute in a way probably in conflict with the decision of this court in *U. S. v. Kenofskey*, 243 U. S. 440.

In the *Kenofskey* case, this Court recognized the uniform rule that when a scheme has been completely executed a later use of the mails cannot be made the basis for prosecution; and it was said, the payment and receipt of money obtained by fraud executes the scheme. In the Decker opinion incorporated into the opinion in the present case the Court avoided the determination of whether the schemes had ended before the checks were mailed by saying that it was unnecessary to consider whether or not the banks cashing the checks acquired title to the checks and thus mailed them in the role of owner. But it is essential to determine that question in order to arrive at a correct answer to the ultimate, vital question, whether the scheme had ended before the checks were mailed. If the banks became the owners of the checks when they were cashed, (and it seems this cannot be controverted under the Negotiable Instruments Law and the decisions*), then,

* In *Burton v. U. S.*, 196 U. S. 283, 297, this Court decided that when a check is deposited in a bank and the amount unconditionally credited to the depositor, the bank becomes the owner of the check, and when it mails the check for clearance, it is acting on its own account as owner of the check. In the present case, the checks were cashed, so there is no question but that the banks became the owners and mailed the checks for reimbursement as such.

the use of the mails by the banks was to serve their own purpose—reimbursement. The liability of the maker was fixed when the checks were cashed; there could be no retraction because the banks were holders in due course. Since the defendants had already received the proceeds of the checks, the scheme was at an end and the mails were not used in furtherance. The mails were used solely to further the banks' interests. By ignoring this vital point the Court below improperly obliterated the distinction between a mailing during the life of a fraud and one occurring after the fraud has been completed.

III. The case involves the proper interpretation of the mail fraud statute on a question which has resulted in conflicting decisions in the United States Circuit Courts of Appeals and has not been, but should be, settled by this Court.

Respectfully submitted,

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BRIEF IN SUPPORT OF THE PETITION.

FACTS.

Petitioner relies upon the facts as set out in the petition.

ARGUMENT.

I.

The evidence shows that the schemes alleged in the indictment were complete before the mails were used and therefore it cannot be said that the mails were used for the purpose of executing those schemes.

Foreword.

At the trial in the District Court and on appeal, both the Government in its brief and the Court below in its opinion made no distinction between the checks set forth in the second and third counts. Both checks were treated as having been cashed. We shall follow that treatment. The second count was based on Jackson's check to the key men in the lumber deal; the third count was based on one of the bonus checks given to V. G. Willis, a consultant.

Near the close of the opinion below the court says there was substantial evidence which indicated that the "conspiracy" was a continuing one but the evidence which supported that conclusion was not even mentioned, much less discussed. We respectfully submit, no evidence was introduced to show any continuing scheme nor was any effort made to show any relation between the checks in the second and third counts. They were completely separate transactions and mere assertions cannot connect them.

The opinion below speaks of the mailing of "letters" to the postmaster at Elkton, Maryland, asking that all mail

for Elk Mills be placed in the post office box of Triumph, as showing a contemplated use of the mails. The stipulation (R. 114-115) showed only one letter of that nature. It should be noted, however, that Judge Chesnut in his Charge to the Jury said the letter merely showed that Elk Mills, as every bona fide business corporation, naturally expected to use the mails (R. 579). It was so clear that this letter had no possible relevancy on whether the mails were used in executing the scheme that the Judge instructed the Jury to disregard it (R. 578-9) and the prosecution did not object to the Court's action. Evidently the appellate court overlooked this ruling when it commented on the letter.

The only use of the mails in the case was by the banks to obtain reimbursement after cashing the checks.

The Law.

The decisions uniformly hold that where a fraudulent scheme has been fully executed, a subsequent use of the mails is not for the purpose of executing, or in furtherance of, the scheme, as required to support a conviction.

Hart v. U. S., 112 F. 2d 128 (C. C. A. 5) (1940);

Spillers v. U. S., 47 F. 2d, 892 (C. C. A. 5) (1931);

U. S. v. Kenofskey, 243 U. S. 440 (1917);

Stapp v. U. S., 120 F. 2d, 898 (1941);

U. S. v. Mitchell, 126 F. 2d, 550, 554;

U. S. v. McKay, 45 F. Supp. 1001.

If then, a use of the mails after the scheme is completed does not violate the statute, the question arises as to when a scheme is at an end. In the instant case there is no suggestion that the mails were used to lull the victim into repose. Since the sole object was the receipt of money, the scheme ended when the money was received. It is submitted that this simple test is the correct one; and any other

criterion would be unrealistic and not in accordance with the law.

The case of *Stapp v. U. S.*, 120 F. 2d 898 (C. C. A. 5) (1941), evidences the court's insistence that it is not enough for the defendant to have devised a fraudulent scheme and that the mails be used by someone as a result of that scheme. The mailing, the Court says, must be in furtherance of the scheme. In that case one Christian, the victim, was induced to believe that the defendant Stapp was an agent of an oil company authorized to buy an oil lease for it from the defendant Rudder for the price of \$8,000, but that Stapp could really buy the lease for \$4,800. The proposal was made and accepted by Christian that he buy it from Rudder for \$4,800 and in turn Stapp would buy it from him for his principal for \$8,000, the profit of \$3,200 to be divided between Christian and Stapp. Christian went to the Pauls Valley Bank with a letter of credit issued by the Tyler Bank. He purchased a cashier's check of the Pauls Valley Bank with a check drawn on the Tyler Bank and bought the lease which subsequently proved valueless. Rudder accepted the cashier's check, payable to himself and the next day cashed that check at the Pauls Valley Bank and received the money. In the regular course of business, Christian's check drawn on the Tyler Bank and the letter of credit were sent through the mails by the Pauls Valley Bank for its reimbursement.

The Court recognized that a mailing may be made the basis of a prosecution even though done by an innocent agent, but, insisted that it is vital to the commission of the offense that the mailing be in furtherance of the scheme. The mailing was held not to be in furtherance of the scheme because the victim had already been defrauded.

The Court said (page 899):

"In this case it is apparent the purpose of the scheme to defraud Christian had been completely accomplished when the Pauls Valley Bank accepted his check on the Tyler Bank and the money was paid to Rudder. Christian was then and there defrauded. Up to that point the mails had not been used at all. Christian (the victim) could not have legally done anything to stop payment of his check and was obligated to reimburse the Pauls Valley Bank for cashing it. While the mails were incidentally used, the defendants had no interest whatever in that transaction."

In our case there could be no retraction after the payees cashed the checks because the banks were holders in due course. The payees had already received the proceeds and were completely indifferent whether the banks used the mails for collection or not.

In *U. S. v. McKay*, 45 F. Supp. 1001 (1942), the scheme was one to defraud the contributors to the campaign of Governor Fitzgerald. McKay falsely represented by means of spurious unpaid invoices that a large deficit was due a certain advertising agency for services rendered during the campaign. The scheme, aimed at great numbers, was successful in at least one case, that of Edsel Ford, who made two separate contributions at different times. Both checks were deposited and cashier's checks were secured. The banks then mailed the checks for clearance.

In sustaining the demurrer and dismissing the indictment, the Court declared:

"The statute specifically provides that the United States mails must be used for the purpose of executing such scheme or artifice or attempt so to do. It is vital to the commission of the offense that the use of the mail relied upon by the Government be in furtherance of the alleged scheme. The demurrer to the

indictment attacks its validity on the ground that the indictment shows on its face that the use of the mails relied upon by the Government in each count was not for the purpose of executing the scheme or artifice charged, but on the contrary occurred after the completion of the alleged scheme and at a time when the fraud, if any existed, had been fully perpetrated. Defendant relies upon the well settled rule that *the mailing of a letter or check, even though connected with or relating to a scheme to defraud, if not for the purpose of executing the scheme, will not support an indictment under the statute.* If the scheme charged was completed before the mail was used, the offense denounced by Section 215 of the Criminal Code does not exist." (Italics supplied.)

In the instant case, as in the *McKay* case, the money was received before the checks were mailed.

Said the Court in that case (p. 1006):

"Under the authorities above referred to, and with particular reliance upon the recent decision of the Circuit Court of Appeals for the Fifth Circuit in *Stapp v. United States*, supra, the Court holds that *the subsequent mailing of the check by the bank in question in order to reimburse itself for the funds it had paid out does not constitute a mailing in furtherance of the scheme charged in the indictment, and that the demurrers to the two counts of the indictment should be sustained.*" (Italics supplied.)

So, in the case at bar, the mailing by the banks for their own reimbursement had no relation to the scheme since the proceeds of the check had already been received by the payees.

In *Dyhre v. Hudspeth, Warden*, 106 F. 2d (C. C. A. 10) habeas corpus was brought after plea of guilty. The indictment alleged that the defendant represented he had

bank accounts in certain banks and issued checks for various amounts payable to the persons to be defrauded, although he had no money on deposit and no intention that the checks should be paid; and that in and for executing the scheme caused a check to be sent and delivered through the mails.

Said the Court at p. 298:

"The fraud charged in each of these counts standing alone is not within the jurisdiction of the Federal court, but it may be brought within that jurisdiction by charging that defendant used the U. S. mail 'for the purpose of executing such scheme or artifice or attempted so to do.' That was charged here, but the charge clearly shows that the U. S. mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until after the defendant had induced the parties named to accept his fraudulent check for merchandise. He had thus accomplished all he set out to do in falsely representing that he had money on deposit in the banks."

Citing *McNear v. U. S.* (C. C. A. 10), 69 F. 2d 861, where the prosecution failed because the scheme was complete, among other cases.

The case of *U. S. v. Kenofsky*, 243 U. S. 440 (1917), although it dealt with the mailing of a fraudulent letter rather than the mailing of a check by a bank, supports our contention that a scheme like the instant one ends when the money is received. There the schemer presented a false letter and proof of death in an insurance claim to his superior, intending that the latter should then mail the false matter to the home office where the claim had to be approved before payment could be made. It was argued that the scheme was completed when the false claim was

handed to the superior, but the Supreme Court rejected this contention, saying:

"We do not think the scheme ended when Kenofskey handed the false proofs to his superior officer. . . . The most vital element in the transaction both to the insurance company and to Kenofskey remained yet to become an actuality, that is, the payment and receipt of the money. . . . *Such payment and receipt would indeed have executed the scheme* but they would not have served to 'trammel up the consequence' of the fraudulent use of the mails." (Italics supplied.)

Thus this Court recognized that the payment and receipt of the money would have executed the scheme; and although such payment and receipt *after* the mailing could not defeat the prosecution in the *Kenofskey* case because the use of the mails there was prior to and was the means of accomplishing such payment and receipt, yet in the instant case, the payment and receipt of the money by the defendants occurred *before* the use of the mails.

The Court below cited the case of *Tincher v. U. S.* (4 C. C. A.) 11 Fed. 2d 18, as authority for its holding that the mailings in the present case were in furtherance of the fraud. But in that case the money was not obtained until after the checks had completely cleared, whereas the collection of the checks in the instant case was immaterial to the defendants since the proceeds were already in their possession. The indictment there consisted of four counts. The first count had as its basis the use of the U. S. mails, during the promotion of the fraud in transmitting a letter containing a lease and note. This use of the mails was the foundation for the entire fraudulent scheme. And it will be found by reference to the record and briefs as well as the opinion, that this aspect of the case was treated by the Court as well as by counsel on both sides as the very

heart of the charges against the defendants, and that the other counts were relegated to a completely subsidiary position.

The remaining counts in the *Tincher* case involved the use of the mails in connection with checks of \$7,000, \$3,000, and \$1,000, respectively. The record indicates that these checks were cashed, not deposited for collection. However, this point was evidently not brought to the Court's attention. A close examination of the opinion reveals that the Court treated the transactions regarding these three checks as deposits for collection and that the mailing was necessary to effect the essential part of the entire scheme, to wit: the receipt and division of the money. Following this line of thought, it would be necessary for the bank, with which the checks were deposited, to forward them through the mails in the ordinary course of business before money could be realized by the defendants. If this were not so, there would be no point in the court's statement at page 21:

"... the defendants caused the checks to be deposited in these banks with knowledge that the mails would necessarily be used in their collection; and the collection of the checks was a necessary part of the working out of the scheme. In fact, it was through the collection of these checks that the defendants collected and divided the spoils of their fraud."

Now, it is perfectly obvious that a deposit of checks by individuals "for collection" by one bank from another bank in reality means that the loot could not be realized until the checks were collected, and the funds forwarded to the bank in which the checks were deposited. That the court had such a situation in mind is apparent from its language.

To substantiate this statement we respectfully point out that the court cited with approval and as authority for its

position on this aspect of the case the following cases: *U. S. v. Spear*, 228 F. 485 (C. C. A. 8) (1915); *Shea v. U. S.*, 215 F. 440 (C. C. A. 6) (1918); *Savage v. U. S.*, 270 F. 14 (C. C. A. 8) (1920).

An examination, however, reveals that in all these cases checks were deposited with banks and the money was not obtained until after the checks had been forwarded by mail for collection and had been paid by the drawee banks. The mails were, therefore, used to attain the object of the schemes—the money.

How different is the situation in the instant case, where the checks were cashed and never sent through the mails for collection on behalf of the payees!

It is thus made abundantly clear that the court had in mind that the checks in the *Tincher* case were mailed for collection on behalf of the defendants. This conclusion is firmly grounded in the Court's own language and the authorities cited. These authorities all properly enunciate the rule that the mailing of checks, obtained by fraud, for collection, as a means of securing the money violates the statute. And it is not difficult to understand this, since in those cases the use of the mails is in direct furtherance of the vital element in the entire scheme—the receipt of the money.

We respectfully submit that the *Tincher* decision must be confined to the facts expressly found by the court and is authority only on fact situations of a similar nature.

Another case which the court below cited is *Hart v. U. S.*, 112 F. 2d 128 (C. C. A. 5) (1940). Hart, one of the defendants, deposited a \$75,000 check, which had been previously obtained by fraud, in the Whitney National Bank of New Orleans. The check was thereafter forwarded through

the mails in the ordinary course of business. The Court, in affirming the conviction, said (p. 131):

"The scheme to defraud was not at an end when Hart endorsed and presented the checks to the bank for no one had yet been defrauded. L. S. U. . . . the state and its taxpayers, sustained no actual loss until the checks had been finally paid, and it is clear that before the L. S. U. account was charged with this item the University might have intervened to stop payment and the fraudulent scheme would have been frustrated."

Implicit in the Court's statement is the proposition that if, in fact and in law, it were too late for Louisiana State University to stop payment on the check, the scheme would have been a fully consummated one and the subsequent use of the mails could not have been made the basis for prosecution.

It is beyond question that under the *Maryland Code*, Article 13, Secs. 49 and 53, the banks were holders in due course of the checks which they had cashed and payment could not be stopped against them.

Article 13, Section 76 of the *Maryland Code* provides:

"A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Dean v. Eastern Shore Trust Co., 159 Md. 213 (1930);

Helvering v. Stein, et al., 115 F. 2d 468 (C. C. A. 4);

Burton v. U. S., 196 U. S. 283 (1905).

Whatever the law may be in Louisiana, it is apparent that payment could not have been stopped in the instant

case; and if not, the entire foundation of the *Hart* case, as it affects the present case, is stripped of any persuasive value.

It should also be noted that the *Stapp* case was decided by the same Court after the *Hart* case and in effect overrules it.

The case of *U. S. v. McKay*, previously discussed at length, points out quite clearly the very thing we are urging here, and in commenting on the *Hart* decision says:

"In relying upon and following the decision in the case of *United States v. Stapp*, the Court is not unmindful of the earlier ruling of the same court in *Hart v. United States*, which apparently is in conflict with its later ruling in the *Stapp* case. But the apparent conflict does not really exist when the opinion in the *Hart* case is carefully considered. It expressly recognized the rule that a use of the mail after the fraud was complete fails to bring the case within the statute, but held that the scheme to defraud in that case 'was not at an end when Hart indorsed and presented the check to the bank for no one had yet been defrauded.' Its ruling was expressly based upon its interpretation of the law as applied to the facts before it, which, whether it was correct or incorrect, was that the drawer of the check 'might have intervened to stop payment and the fraudulent scheme would have been frustrated.' In both the *Stapp* case and the present case, it was beyond the power of the victim to intervene and stop payment on the check which was the subject of the mailing."

And so, in the instant case, it was beyond the power of the Triumph Company, the alleged victim, to intervene and stop payment of the checks. In the first place, the Jackson check in the second count and the Elk Mills check in the third count were not the victim's. But aside from this, after the checks were cashed the victim could not stop payment against the banks which were holders in due course.

Summing up, the schemes were complete when the checks were cashed and the payees received the proceeds; and therefore, the later mailing of the checks by the cashing banks, to obtain reimbursement, was not for the purpose of executing the schemes.

II.

The evidence was so clearly consistent with the petitioner's innocence that the verdict of guilty cannot be justified and requires this Court to exercise its discretionary power of review.

Use of Elk Mills Necessitated by Limitation in Loan Agreement.

From the Government's view, the scheme to defraud consisted in the diversion from Triumph of profits enuring under Government contracts, to Elk Mills as a subsidiary of Triumph, and eventually to the defendants through salaries and bonuses. This was the government's basic conception of the fraud practiced upon Triumph and its stockholders, and in carrying out the plan for the use of Elk Mills, it was charged, certain fraudulent acts occurred.

If the plan to use Elk Mills had its origin in what was deemed legitimate business necessity, the government's theory that Elk Mills was formed to divert profits from Triumph must collapse. The evidence established that Triumph, before the creation of Elk Mills, had taken a contract with the War Department to manufacture incendiary bombs which it could not fulfill because the contract required a capital outlay far in excess of the limitation in the Loan Agreement with the banks. This is undisputed.

The company was in a serious dilemma. If it cancelled the contract a ruinous law suit by the Government might have resulted or, at best, the company would have incurred

the hostility of its chief customer. If, on the other hand, it went ahead and made the necessary capital expenditures itself, the banks might cancel the loan and require the full amount to be repaid forthwith. This would have been equally disastrous. What was the company to do?

Although there was no direct evidence to show that the banks would have sanctioned the very substantial additional capital outlay required, the prosecution's position was that a direct request should have been made to obtain the necessary permission. This contention ignores the evidence of difficulties encountered in the past in obtaining permission for capital expenditures which were small in comparison with that necessary to perform this contract. Moreover, while only a couple of weeks before the plan was submitted to the banks, the limit for capital outlay was raised by \$60,000, it is undisputed that on this occasion there was quite a row about the matter and the corporation was warned "to watch its step". Even with this increase the corporation was permitted only approximately \$6,200 additional for capital expenditures on all its contracts. To put it in the words of the petitioner: "We were in bad with the banks . . . and I don't believe we could have gotten \$25,000 additional authorization, let alone an authorization of over \$200,000."

The officers of the company felt there was no chance of getting the banks' permission. They decided to use Elk Mills as a subsidiary. The expenditures would then be made by the subsidiary, not Triumph. It was hoped in this way to carry out the incendiary contract and avoid trouble with the government and the banks. This plan was submitted in detail to the banks in Weil's letter dated December 15, 1942 (R. 267-272*). The letter clearly stated

* This letter reveals the entire good faith of the plan. We respectfully urge this Court to read it.

that the plan was necessary "in view of the foregoing situation, first, the refusal on the part of the banks to permit Triumph to expend approximately \$200,000 additional of capital assets . . .". The conferences that followed with the officials of the banks were clearly predicated on the assumption of all concerned, that the banks would not authorize Triumph itself to make such a large capital outlay.

In the course of his testimony, Mr. Lucas, the banker, was asked:

"Q. Did your counsel, or did you and Mr. Zurlinden or any of your board who were considering the matter, ever suggest as an alternative that you would extend the limit of capital investment to Triumph if they would take the contract directly? A. Not in this case. It was never suggested, no. I mean it was never put up to us, therefore we never either suggested we would do it or would not" (R. 283).

The most that can be said for this testimony is that the witness did not know whether the permission would have been granted.

"If the banks had been willing to permit such a substantial increase in the capital expenditure limitation under the Loan Agreement, can it be doubted that they would have so informed Weil upon being presented the plan for the formation of Elk Mills? Yet the Record says they did not do so. The fact seems to be incontestable that both the bank representatives, before whom the plan was so fully detailed, and Weil, acted on the premise that the permission would not be granted (R. 283). When these facts are considered the point that no direct request was formally made is reduced to a mere quibble.

Certainly the creation of subsidiaries to carry out certain contracts or duties for the parent company's benefit is so

commonplace at this date that any lengthy citation of authorities is unnecessary.

Dittman v. Distilling Co. of America, 64 N. J. Eq. 537, 54 Atl. 570.

In *Rubino v. Pressed Steel Car Co.* (N. J. Eq.), 53 Atl. 1050, the court said:

"... A manufacturing corporation, whose articles embrace a very wide variety of business, including the purchase or other acquisition of shares of stock of other corporations may form a new corporation to conduct a similar manufacturing business, with the stock largely held by the parent company, where the purpose is to increase the business and profits of the latter.

Cited with approval in *Durham v. Firestone Tire Co.* (1936) 55 P. 2d 648,

and see *Fletcher on Corp.*, Vol. 6, Sec. 2823."

The opinion below adopted without discussion the government's array of facts deemed sufficient to raise inferences of fraud. However, no reasoned analysis of the evidence was made and a fair consideration of the points mentioned in the opinion completely dispels these unwarranted inferences.

(a) Additional Pay.

The court lists in its category of improper acts the salaries and bonuses paid by Elk Mills to its officers and consultants. The undisputed evidence shows that the work under the incendiary bomb contract was carried on with great efficiency and by improvising entirely novel techniques. The key men, in their duties to Elk Mills, were doing work that was outside the range of their duties for Triumph. Surely they were entitled to additional compensation for their efforts, which incidentally substantially benefited the parent company as well as the subsidiary.

Primarily, the amount of such compensation is for the directors and ordinarily the civil courts are the tribunals before which such a question is presented if a dispute arises. But here is a criminal prosecution. The striking feature in this case is that we do not find the so-called defrauded parties, Triumph Explosives or its stockholders, complaining from the witness stand, and the reason is not far to seek: the undisputed evidence from the government's own witnesses shows that Triumph benefited to a very large extent under the Elk Mills plan.

(b) Lack of Knowledge by Certain Directors About Elk Mills—Shirley and MacBride.

The Court asserts that three directors of Triumph knew nothing about Elk Mills until the investigation by Commander Selzman. Is this any evidence of fraud, particularly in the light of the only explanation given by these directors themselves as government witnesses? The evidence shows that Diamondstone, one of these directors, was not present at the meeting in which Elk Mills was discussed, nor is it shown that he was present at any subsequent meetings. As to the other two directors, Messrs. MacBride and Shirley, they were both present on March 17, 1942, at the meeting in which Elk Mills was discussed, but their later resolution shows that they left before Elk Mills was discussed. It is also to be noted that these two directors attended meetings very rarely. In answer to the Court's question, Mr. MacBride said that he was present at only one meeting between December 11, 1941, the date of the first Elk Mills discussion, and October, 1942. The same applies to Mr. Shirley. It is difficult to understand how the court below infers from this any fraud or inference of fraud. These directors just did not attend to their duties, and so they knew nothing about Elk Mills.

There is a significant bit of evidence which shows that the use of Elk Mills as a subsidiary was not a secret at all but was clearly apparent to anyone. We refer to the testimony of the government witness Forestell, who said that the name "Elk Mills" was painted in large letters on a door in the main corridor of the Triumph office building (R. 505). If there was any intention to keep Elk Mills a secret there certainly would be no reason to advertise the name in this exposed place.

(c) Notices to Directors of Meeting.

The Court states that the notices of the Directors' meeting at which Elk Mills was approved did not specify that Elk Mills was to be considered. Of course the notice of the meeting of Directors of December 11th contained no reference to the formation of Elk Mills Loading Company! The testimony showed that Mr. Kann received a memorandum from Feldman dated December 3, 1941, which was his first knowledge of the Elk Mills and incendiary bomb picture; that a few days thereafter he consulted Mr. Weil, and requested him to come to Elkton to discuss the matter. It was not until Kann and Weil arrived at Elkton on the morning of December 11th, the day of the meeting, and talked with Decker and the five key men, that the situation was revealed with sufficient clarity to attempt a solution. Prior to December 11th the only thing that could have been set forth in the notice of the meeting would have been some absurd statement, as one of the purposes: "To discuss the performance of an incendiary bomb contract entered into without the President's knowledge and the use of a company known as Elk Mills Loading Company, the incorporation costs of which have been paid by Feldman." There was nothing improper in the notice to the Directors of the meeting in which Elk Mills was discussed. The call was in the customary broad language

and it was not necessary to specify that any proposal relating to Elk Mills was to be discussed. Interpretations of the by-laws may vary, but no inference of criminal fraud can be drawn from the mere fact that the call for the meeting did not specifically mention Elk Mills.

(d) Alleged Falsity of Minutes.

The Court says the minutes were false because they showed five Directors present at the March 17th meeting, whereas only three were there. This statement is without foundation in the Record. The minutes were not false. They show that the five Directors were present, and if perchance the minutes failed to note that one or more Directors left the meeting before its conclusion, it cannot properly be claimed that the minutes were false. It is customary for secretaries of corporate meetings to note the names of those present at the opening of the meeting, and if anyone leaves before the end of the meeting, that would scarcely be mentioned in the minutes. Certainly failure to do so is no evidence of fraud on the secretary's part or of anyone else.

(e) Domination of Elk Mills.

The Court says that Kann and two other Directors could dominate Elk Mills. Granted. The evidence shows that at Mr. Weil's instance 55% of the stock in Elk Mills was retained by Triumph to assure control for its protection. Such control would normally be exercised by the Triumph officers.

But the question of control is a false issue. It may be conceded that Kann and any two other directors could control Elk Mills. The petitioner is not seeking to escape on the ground that Elk Mills was not used by Triumph with his full consent. His point is that this use was for legitimate reasons. The argument about "control" merely confuses the issue, and proves nothing.

(f) Demeanor and Bearing of Petitioner.

The statement that Kann's demeanor when interviewed was such as to justify the idea that he was guilty is refuted by the Record and is a piece of sheer fantasy. As soon as Kann learned of the lumber deal, he immediately stated it was wrong and that the money should be paid back. Not only this, but he likewise insisted that because of their breach of the agreement the five men should return their stock to the company. What could be more honest or proper on the part of the defendant? And the key men agreed to do so upon the appellant's insistence. Is resort to this sort of catching at thin air to justify the guilty verdict, capable of defense?

(g) Letter from Weil Criticising Minutes.

The letter referred to by the Court clearly relates to tax matters, not to the formation of the Elk Mills Company. In this connection, it must be remembered that the plan was adopted on December 11, 1941, and the letter was written the following February, after the banks had approved the plan. Moreover, the letter demonstrates what the government attempted to disprove, namely, that the key men were personally to pay for the land and transfer it to Elk Mills as consideration for their receipt of 45% stock of that company. In testing the petitioner's state of mind this letter is a strong indication that he and his attorney fully expected the key men to pay for the land.

(h) Use of Triumph Facilities and Employees.

The use of Triumph's employees and facilities was arranged by contract between the corporations when it was found that such use would result in a more efficient method of operation. The F. B. I. agent, Oldham, it will be recalled, testified that the inter-company accounts were properly and accurately kept. Elk Mills paid for these services at 5¢ per bomb. The Record shows that Triumph

as a result made a profit of some \$40,000.00 (R. 426). It is difficult to understand what prompted the Court below to list this feature as justifying any inference of fraud. If anything, it tends to show the complete honesty of the arrangement.

*(i) The Land Purchase and 45%
Stock to the Key Men.*

The court's method of listing these matters without discussion lends a sinister note to a perfectly innocent transaction. The circumstances negate any idea of fraud. Under the agreement the five key men (of whom the petitioner was not one) were to purchase a suitable tract of land and transfer it to Elk Mills as consideration for the issuance of 45% stock of that company to them. It might be well to add parenthetically that although this proportion of stock may seem large, it must be recalled that there was no certainty at the time of this arrangement that large profits would be forthcoming on this contract, and of course it was the aim to provide these men with greater pay and thus make more certain their continuing in the employ of Triumph. It is a concession in the case that a defect existed in the land title which eventually required court proceedings. The only evidence as to the petitioner demonstrates his good faith. On his periodic visits he repeatedly made inquiry as to whether the land had been paid for and he was informed by these men that although they were ready and willing to pay for the land the necessity of clearing the title prevented the consummation of the transaction. Later, when the lumber transaction, (to be discussed presently) came to light the petitioner promptly took steps to cancel the entire arrangement, and the men were required to return the 45% stock of Elk Mills which they held. Certainly there can be no imputation of fraud on the petitioner's part in this matter.

(j) *The Lumber Deal.*

The key men devised this improper deal. The evidence showed that the petitioner had no part in it. However, in a desperate effort to connect the petitioner with the only fraud shown in the entire evidence, the Government seized upon the testimony of Witness Jackson. This witness testified that, after discussing the matter with one of the key men in the latter's office, they came out and saw the petitioner walking down the corridor. The key man, without explanation of any kind, asked the petitioner whether it was all right to pay Jackson's bill. The petitioner said "I don't see why not"—and walked on.

The law is well settled that an officer of a corporation cannot be held criminally responsible for illegal actions of other officers in which he never joined or knowingly sanctioned.*

The Government, therefore, was forced to rely completely on this bit of testimony in its attempt to show the petitioner's knowledge of the scheme.

This same witness (Jackson) stated without contradiction that the petitioner had no dealings with him and had nothing to do with construction or the payment of bills (R. 177); that the petitioner knew that the witness was the builder (R. 165) and as such was entitled to be paid in in-

* In *State v. Thomas*, 123 Wash. 299, 212 P. 253, it was said:

"The general rule is that where the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of the corporation that he actually and personally do the acts which constitute the offense or that they be done by his direction or permission."

In *State v. Carmean*, 126 Iowa 291, 102 N. W. 97, the principle was stated:

"An officer of a corporation, no matter how great his responsibility, is not as a general rule criminally liable for the acts of the corporation performed through other officers and agents who are not acting under his direction or with his permission."

See also:

13 *Amer. Jurisprudence*, Sec. 1100, p. 1027;

19 *C. J. S.*, Sec. 931—Criminal Responsibility.

stalments for work and materials; that some of the witness' bills were for lumber purchased by him on the outside at about the same time (R. 168); that the petitioner was not present when the key men directed the witness to make a check out to them (R. 163); that he was not one of the payees; that nothing was said in the petitioner's presence about reimbursing the key men (R. 164). With these uncontradicted facts in mind, when the petitioner while walking down the corridor was asked if it was all right to pay the "bill" (or "lumber bill") and no explanation was given, could there have been a more spontaneously innocent response than that ascribed to him—"I don't see why not"—and then continue on his way?

In order to arrive at even the slightest inference of guilty knowledge, the evidence must be subjected to violent torture. It is submitted, the proof falls far short of raising any inference other than that of innocence.

The Court below says that whatever may be the effect of an analysis of each occurrence brought forward by the prosecution to show fraud, the composite picture of all these clearly proved fraud. Composite picture of what? Of circumstances either fully explained or the deductions from which were more consistent with innocence than guilt? Resort to such sweeping generalization cannot take the place of reasoned analysis of the evidence to demonstrate that the circumstances were inconsistent with innocence. But this, the court below did not undertake to do.

The evidence was not merely consistent with innocence, which under the authorities is sufficient for reversal,* but it was entirely inconsistent with any other conclusion.

* *Chambers v. U. S.*, 237 Fed. 513:

"Where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate Court to reverse a judgment of conviction. *Harrison v. U. S.*, 200 Fed. 662; *Isbel v. U. S.*, 227 Fed. 788."

CONCLUSION.

On the mailings, the evidence showed that the checks were mailed after the alleged schemes were complete and only for the bank's reimbursement; therefore not in furtherance of the alleged frauds.

As to the evidence, we confidently assert that the court will find that legitimate business necessity compelled the use of Elk Mills as a subsidiary of Triumph. There was absolutely no fraud in this arrangement and the subsidiary proved financially beneficial to Triumph and its stockholders. In the ensuing transactions which the Government contends constituted fraudulent schemes, with the exception of the lumber deal, no fraud in reality was intended or perpetrated. On the lumber deal, the evidence disclosed a fraudulent scheme by the key men, but the petitioner had no part in it and knew nothing about it until a later date, when he took steps to compel repayment of the money to Triumph. In view of the complete absence of any real proof of guilt, it is plain that the verdict of the jury and the decision below were arrived at by piling inference on inference, a practice condemned by this Court. We can only point to the present war period, with the inevitable tendency to indiscriminating severity in any matter relating to the manufacture of munitions and the dramatic seizure of the plant, as explaining, but not justifying, the verdict.

Upon the whole case it is submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1943:

No. 759.

GUSTAV H. KANN:

Petitioner.

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
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REPLY BRIEF OF PETITIONER.

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ON THE MAILING QUESTION THE ONLY GROUND
RELIED ON IN THE BRIEF OPPOSING THE PETI-
TION IS AN ASSUMED CONTINUING NATURE OF
THE ALLEGED SCHEME. BUT THIS ARGUMENT
IS WITHOUT POINT BECAUSE NO CONTINUING
SCHEME WAS SHOWN IN THIS CASE. THE EX-
ISTENCE OF CONFLICT IN THE DECISIONS OF
THE CIRCUIT COURTS OF APPEALS STANDS
UNIMPEACHED AND THEREFORE THE PETITION
SHOULD BE GRANTED.

In seeking to avoid the conflict shown by the decisions
of the Fourth Circuit Court of Appeals below and the Fifth¹

¹ *Stapp v. U. S.*, 20 F. (2d) 898 (1941) (C. C. A. 5).

and Tenth² Circuits, the Government now contends that in this case the scheme was a continuing one and points to its brief in the *Decker* case (No. 729) to show that there is no conflict.

However, the "continuing" theory is unavailable to the Government in this case. In the first place, this theory was not relied on at all by the Government during the trial in the District Court; and was merely in the form of a bare suggestion in the Government's brief on appeal, but was not argued or pressed. The trial court and counsel on both sides in the present case recognized that in the *Decker* case the evidence showed a series of checks which were all of a similar nature and part of one general scheme; and the trial Judge properly held that the scheme there was a continuing one. Reference to the discussion in this case between the Court and counsel after all the testimony was in, when the trial Judge was deliberating upon whether to take the case from the jury on an instructed verdict, clearly shows that all recognized that whereas in the *Decker* case there was a continuing scheme, in this case the situation was entirely different:

(Tr. 524-6):³

"(The Court) The one question on which I would be glad to hear counsel is this prayer as to mailing. The Court instructs the jury the verdict must be for the defendant Kann because of the uncontradicted evidence that the alleged mailing was not in furtherance of any scheme by the defendant to fraud."

(Mr. Sobeloff) Yes, sir. I think that presents a substantial question. Your Honor will recall that in the other mail fraud case [*Decker*], it was a very close point, and your Honor drew a distinction between

² *Dyke v. Hudspeth, Warden*, 106 F. (2d) (C. C. A. 10).

³ References are to the transcript from the Circuit Court of Appeals below which has been filed in this Court pursuant to Stipulation of the parties. (See R. 219-220).

some of the cases we were relying on and the case then at bar, and pointed out that there was a continuing scheme, that there was a series of checks, all related to one another, and that it was necessary for them all to clear in order that the scheme might succeed, that the disclosure of the scheme would interrupt its execution. Your Honor's language * * * is this:

* * * * 'The scheme was a continuing one formed in 1941 and running over the period of a year thereafter. It was not an isolated transaction in which a person fraudulently obtains the check of another on a foreign bank and immediately has it cashed.' And may I interrupt the reading to add that in this case you have just that; two checks that were cashed. 'Here the scheme,' your Honor says, 'was by officers of the corporation to defraud not the local Elkton Bank but the corporation of which they were officers, by drawing checks on the corporation's bank accounts and concealing the transaction by false entries on the corporate books. * * * Then your Honor says that they had no thought of simply abstracting a sum of money from the corporation and then discontinuing their relations with the corporation. 'It was of the essence of their scheme that the moneys of the corporation should be effectively withdrawn from the bank account and proper withdrawals concealed by false entries on the books, as a continuing scheme lasting over a period of many months and doubtless intended to be concealed forever.'

That was spoken, your Honor will recall, with respect to a series of items charged as commissions and, so far as the items show, falsely and improperly charged. You do not have that fact situation in this case. Here you have two mailings; one of this \$5,000 check of Willis'—

(The Court) I quite appreciate there are factual distinctions in the evidence between the mailing in the case that was tried and resulted or caused this opinion to be written on motions for a new trial."

Again the trial Judge expressed his appreciation of the factual distinction between this case and the *Decker* case by pointedly commenting:

(Tr. 528-9):

"(The Court) Now Mr Paisley [the prosecutor], I would like you to tell me the affirmative view as to why you consider that the mailing of these two checks was in furtherance of the scheme. The case on the facts with regard to the mailing, I think you must appreciate, is less strong than in the other case [Decker] that was tried. At least, that is the way it impresses me, and I will be glad to hear what you say about it."

And later the Judge again said (Tr. 537), the evidence here as to the mailing was weaker than in the other case.

Although the prosecution prepared this case with painstaking thoroughness for several months before the trial, no argument on "continuation" was made at the trial or on appeal. The opinion below merely contained a one sentence, gratuitous statement that the evidence in the case showed the scheme to be a continuing one but did not elaborate or attempt to show why that was so.

It is submitted that the mere contention now by the Government that the scheme here was a continuing one is not sufficient. If this were not so, it would be entirely within the Government's power in any case under the mail fraud statute to say that a particular mailing, no matter how isolated, was part of a continuing scheme which the defendant had in mind and thus render unnecessary the determination of whether the scheme was consummated before the mails were used. The absurdity of any such proposition is manifest. Yet here, in effect, the Government's position is just that.

In order to show a continuing scheme the Government must establish some connection between the mailings. In this case, as our principal brief points out, the mailings related to two isolated transactions that had no possible connection with each other. Merely because the Government now says that the scheme was a continuing one, without even attempting in any way to demonstrate why or how, does not prove anything, particularly as the point was never pressed at the trial or on appeal.

As shown in our brief, after the checks had been cashed, the banks forwarded them by mail to collect the sums they had previously paid out. In other words, the mails were used by the banks in their own behalf, after the successful completion of the alleged scheme, to obtain reimbursement and the defendant consequently had no interest in whether the banks used the mails or not.

The Government's injection at this stage of a "continuing scheme" theory demonstrates that it is fully aware that there is an irreconcilable conflict in the decisions of the Circuit Courts of Appeals on the real question in this case, namely, whether the use of the mails by a bank solely to obtain reimbursement for itself, after cashing a check, is in furtherance of the scheme of the individual cashing the check. The Fourth Circuit Court of Appeals in the present case has decided in the affirmative, while the Fifth Circuit Court of Appeals in the *Stapp* case and the Tenth Circuit Court of Appeals in the *Dyhre* case have decided in the negative; and the recent District Court decision in *U. S. vs. McKay*⁴ expressly follows and relies on the *Stapp* decision.

⁴ 45 F. Supp. 1001, decided by the District Court for the Eastern District of Michigan, July, 1942.

CONCLUSION:

Any argument based on a continuing scheme is entirely irrelevant and has no place in this case. The decisions of the Circuit Courts of Appeals are in direct conflict on the point really involved and review should be granted in the interest of uniformity as well as to reverse the incorrect decision below.

SIMON E. SOBELOFF,

BERNARD M. GOLDSTEIN,

Attorneys for Petitioner.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 35.

GUSTAV H. KANN,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

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JURISDICTION.

This Court granted a writ of certiorari on April 10, 1944 to review the judgment of February 4, 1944 by the U. S. Circuit Court of Appeals for the Fourth Circuit. Jurisdiction to grant the writ is found in Section 240 of the Judicial Code, as amended (28 U. S. C. A. 347). See also: Rule 38 of this Court, 28 U. S. C. A. following Section 354, and Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934.

OPINION BELOW.

The Trial Court did not write an opinion in the case. Its charge to the jury, however, is included in the Record at page 210. The Circuit Court of Appeals' decision, dated February 4, 1944 is reported in 140 F. (2d) 380 and is also included in the Record at page 232.

STATUTE INVOLVED.

The Federal Statute involved is Section 215 of the Criminal Code (18 U. S. C. A., Sec. 338):

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.”

STATEMENT OF THE CASE.

The Indictment and Proceedings Below.

The petitioner is one of eight defendants who were indicted on February 16, 1943, charged with using the mails in a scheme to defraud (Criminal Code, Section 215, U. S.

C. A., Title 18, Sec. 338). The indictment is in three counts. Each count alleged the same fraudulent scheme and the mailing of different checks was made the basis of the three counts.

Briefly, the scheme alleged consisted in the subcontracting by Triumph Explosives, Inc., of government contracts to Elk Mills Loading Co., a subsidiary, with the intention that a large part of the profits should be distributed to the defendants through salaries, dividends and bonuses. The indictment further alleged the mailing of separate checks, one of which was set forth in each of the counts, for the purpose of executing the scheme. The petitioner pleaded "not guilty" and the other defendants, "nolo contendere".

The first count was abandoned at the trial and when all the testimony was in, the petitioner requested the trial judge to instruct the jury to return a verdict of "not guilty" because the evidence showed the mails were not used for the purpose of executing the schemes alleged, and because the evidence was legally insufficient to prove the petitioner's fraud. These requests were refused and exceptions were duly noted.

The jury thereupon returned a verdict of "guilty" on the second and third counts. On October 30, 1943, the District Court entered its judgment that the petitioner be imprisoned for a period of three years and pay a fine of \$2,000 and costs. An appeal was filed in the Circuit Court of Appeals for the Fourth Circuit which affirmed the conviction.

*The Mailing of the Checks Upon
Which the Indictment Was Based.*

The check described in the second count was that of the contractor Jackson, made payable to the five "key men" hereinafter identified (of whom the petitioner was not

one). This check was cashed by the payees at an Elkton, Maryland bank which then mailed it for reimbursement to the bank upon which it was drawn at Wilmington, Delaware.

Although it was conceded that the petitioner did not receive any money from and had no connection with the cashing of this check, the government contended that he knew of and was a party to the payees' improper dealings which resulted in the issuance of the check and was therefore legally accountable for its mailing. The petitioner insisted that he knew nothing about the improper manipulations.

The third count was based on a check of a subsidiary of Triumph, Elk Mills Loading Company, drawn on the subsidiary's Elkton bank in payment of a bonus to one of the company's consultants, V. G. Willis. (Similar bonuses were likewise paid to each of the other Elk Mills officers and technical advisers including the petitioner.) This check was carried by Willis to Newark, Delaware, where it was unqualifiedly endorsed or cashed by him at his Newark bank. The bank in turn, to reimburse itself, mailed the check to the bank at Elkton.

Although here, likewise, it was conceded that the petitioner received no money from and had no connection with the depositing or cashing of this check, the government asserted that the check was issued by Elk Mills, which it contended was a sham subsidiary formed with the fraudulent design of diverting profits from Triumph through the subsidiary and eventually to the defendants. And since the petitioner knew of and had approved the plan for the subsidiary, he must be regarded as a party to the fraud and therefore responsible for all checks issued pursuant

to the alleged scheme. The petitioner unhesitatingly admitted that he knew of and had approved the plan for the subsidiary, but he denied that it was created for a fraudulent purpose and insisted that it was formed for an entirely legitimate business reason, viz: to enable Triumph to carry out a contract with the Government which it could not otherwise have done.

As is hereafter shown, assuming a fraudulent scheme existed, these mailings do not constitute a violation of the mail fraud statute.

History of Triumph Explosives, Inc.

Triumph Explosives, Inc., a corporation located at Elkton, Md., was originally a comparatively small company engaged in the manufacture of fireworks, fuses and signal lights. With the outbreak of war in Europe the company began to receive contracts from various governments for munitions, and after the United States became involved in the war these contracts rapidly swelled in number so that the Government of the United States became the company's principal customer.

The petitioner, Gustav H. Kann, residing in Pittsburgh, Pa., and making only periodic trips to Elkton, was the president of the company. His duties consisted chiefly in financial supervision and general administration. He had nothing to do with matters of production, management, plant expansion, building (R. 62), or the securing of contracts, although in a general way he knew of the workings of the company. The actual operation of the production units was under the supervision of Mr. Joseph B. Decker, the vice-president and production manager, who resided at the corporation's place of business in Elkton, Md.

The Key Men.

Connected with the company since its inception (R. 166) were certain individuals, referred to throughout the Record as key men: Feldman, Priol, Willis, Deibert and William L. Kann, Jr. (the last named being a nephew of the petitioner) who through practical experience and application had acquired "know how" in the manufacturing of explosives (R. 151), and held highly important positions in the company* (R. 166). As the profits multiplied these men increasingly manifested signs of dissatisfaction (R. 166) with the amount of their pay (R. 150, 151). Due to the great dearth of men skilled in the explosives field (R. 151), it would have been an easy matter for them to make connections with other companies engaged in manufacturing explosives (R. 151), and if they had left it would have been very damaging to the company which was deeply immersed in an ever-growing backlog of Government orders for munitions. (R. 168).

Loan Agreement With Banks—Limitation on Capital Expenditures.

The corporation had a loan agreement with the People's Pittsburgh Trust Company of Pittsburgh and the Federal Reserve Bank of Cleveland, which prohibited the company from making investments in capital assets, that is, in land, buildings, and equipment, beyond certain stipulated sums; and it also was restricted in granting salary increases to employees beyond a certain point, without prior approval of the banks. The principal reason for this limitation was the bank's insistence that the loan be susceptible of easy liquidation on maturity (R. 110). The banks did not want more than the stated amount to be

* The designation "key men" used hereafter refers solely to these individuals and does not include the petitioner.

expended for plant expansion since this would render timely liquidation of the loan difficult, if not impossible. The limitation on capital expenditures could be raised only after application to and approval by the banks.

The original limitation was for \$160,000 in capital expenditures and ran from August 1, 1940 to March 1, 1942 (R. 115). It was amended on August 14, 1941, by increasing the limitation to \$240,000 but the period during which the permissible expansion in capital assets could be made again started from August 1, 1940, and ran to September 15, 1942. (R. 116). It is important to note that the limitation extended to all expenditures for capital assets during the entire period between the dates mentioned (R. 115, 116).

The Incendiary Bomb Contract.

In the latter part of 1941, the Chemical Warfare Service of the United States Government requested the company to bid on the manufacture of incendiary bombs, an entirely new product, the manufacture of which was hazardous and it was unknown at the outset what profit, if any, could be made (R. 171, 172); nor was there any accurate gauge for measuring the production costs. At first it was felt that such a contract would be an undesirable one for the company and a high bid was purposely submitted (R. 147), but, as the Government urged the company to bid, a bid more in line with the estimated manufacturing cost was later made, and on November 27, 1941, a contract was awarded the company for 3,800,000 incendiary bombs at 39.78 cents per bomb, totaling roughly \$1,500,000 (R. 148). All the negotiations leading up to this contract were carried on by the key men of the company and Mr. Decker, the operating vice-president (R. 147, 148). The petitioner took no part in these negotiations and did not know that

a contract had been awarded until later (R. 148, 160, 166), although he did know in a general way that negotiations were going forward concerning incendiary bombs (R. 167).

Feldman Memorandum—Elk Mills Created.

On December 3, 1941, a memorandum was handed to the petitioner, signed by S. M. Feldman, one of the key men (R. 165). The memo gives the background of the incendiary contract and recites the initial unwillingness to bid on the contract but asserts that later the key men requested Decker to bid (R. 147), with the understanding that upon receipt of the contract, it would be sublet to a new company which would perform all the work (R. 147) and would agree to pay a 10% net profit to Triumph (R. 147, 148). Although the petitioner had heard talk of separate companies for doing certain work (R. 165), this was his first specific knowledge of any plan for the creation of Elk Mills (R. 165). The paper informed the petitioner for the first time (R. 166) that a contract had been entered into between the War Department and Triumph for the manufacture of incendiary bombs; that a corporation known as Elk Mills Loading Corporation had already been formed for the purpose of carrying out the contract; that the costs of incorporation had been paid for by Mr. Feldman (R. 148); and the memorandum contemplated a division of the stock of the newly-formed company equally among the several key men, the petitioner, and Decker (R. 148). The memo further stated: "The plant has been laid out and construction is to start very shortly."

More About the Limitation on Capital Expenditures.

In order that what followed may be understood in its proper perspective, a little more must now be said about the situation then prevailing with respect to the limitation

on capital expenditures. On November 28, 1941, approximately a week prior to Mr. Kann's receipt of Mr. Feldman's memorandum, the limitation had been raised by the banks to \$300,000, again including all capital expenditures theretofore made from August 1, 1940, to September 15, 1942 (R. 116). This last increase was necessitated by the discovery on November 19, 1941, that Triumph had already exceeded the previous \$240,000 limitation (R. 117). Triumph's explanation was that in considering the sum laid out for capital expenditures they figured on the net sum invested after depreciation, but the banks insisted that the limitation referred to the gross amount invested in capital assets (R. 117). Since Triumph, under the banks' interpretation, had already exceeded its authorization and since the breach was a technical one (R. 117), the limit was raised to \$300,000, but the corporation was warned to "watch its step" (R. 168) and to be very careful not to expend more than the authorized amount in capital assets (R. 117).

Although the limit was thus raised to \$300,000, inasmuch as the company had already expended over \$293,000 in capital assets (R. 112), only the difference, approximately \$6,200, was actually available for additional capital investment *on all the contracts of the company* (R. 112, 168) for a period of several months (R. 168); and on this occasion the Federal Reserve Bank in a letter to the People's Pittsburgh Bank wrote: "We must insist that they (Triumph) keep within the limitation of \$300,000" (R. 117).

The entire history of the capital limitation clause was marked with great difficulty for the corporation since the banks took a very rigid view of the provision, and on many occasions the corporation was warned, that the banks would not tolerate larger investments in capital assets than

permitted by the agreement (R. 167, 8); and efforts to obtain the banks' permission to increase the authorized capital expenditure invariably met with great resistance on the part of the banks (R. 167, 8).

*Banks Unwilling for Triumph to Make
Necessary Expenditures.*

Since the incendiary bomb contract required additional capital expenditures of between \$200,000 and \$250,000 (R. 106), and in view of Triumph's unfavorable standing with the banks at this time (R. 169) and the difficulties experienced on former occasions in securing permission to spend comparatively trivial sums (R. 154, 167-8), it was felt it would be a futile and idle gesture to request the banks to permit such a large outlay in capital assets (R. 151, 154, 160, 169). Even if the government advances on the contract, of which the banks were fully aware, were used to acquire capital assets, both the petitioner and Mr. A. Leo Weil, Jr., of Weil, Christie & Weil, of Pittsburgh, the company's counsel, who dealt with the banks, believed such use would likewise violate the Bank Agreement (R. 169).

The Dilemma.

The company was thus in the unfortunate position of having bound itself by a contract with the War Department for vitally needed munitions which it could not fulfill because the banks would not sanction the necessary capital expansion (R. 152, 154). Aside from the natural patriotic desire to furnish the War Department the sorely needed munitions, on purely business grounds the company could not afford to breach the contract and thereby expose itself to ruinous litigation (R. 152) or, at best, antagonize its chief customer, the Government of the United States. Nor could it proceed with the contract without violating its agreement with the banks (R. 152, 169).

*Proposal to Resolve Dilemma by
Using Elk Mills.*

This was the situation when the petitioner received Feldman's memo. He promptly consulted Mr. Weil, Jr., general counsel of Triumph. The attorney criticized the proposed plan, stating that officers and directors of Triumph should not own stock in a company taking a sub-contract. The petitioner requested him to attend a board meeting of Triumph at Elkton on December 11, 1941 (R. 149). Mr. Weil did so, and at this meeting it was explained that the performance of the contract would necessitate the expenditure of large sums in capital assets (R. 14), and since the banks had indicated their unwillingness to assent to such further capital expenditures (R. 14), and in order to carry out the contract and satisfy the demands of the key men for greater remuneration (R. 15), it was proposed to sublet the contract to Elk Mills Corporation; and as the government advanced sums to Triumph on the contract, Triumph would in turn make advance payments to Elk Mills for the necessary equipment and machinery (R. 15).

Under the plan, the five key men were personally to pay for and acquire a suitable site (R. 15) for the erection of a plant and transfer it to Elk Mills. In return, they were to receive 45% of the stock of Elk Mills; and the remaining 55% was to be owned by Triumph (R. 15).

The parent corporation was to purchase the equipment and supplies and charge the sums paid out to Elk Mills (R. 16, 173), and was also to receive a flat 10% profit on the face amount of the contract, with Elk Mills performing all the work (R. 16).

Approval by Board of Directors.

This proposal was approved by the Triumph's Board of Directors, at a meeting called for December 11, 1941, pursuant to the customary broad notice, but the approval was expressly made "subject to the People's Pittsburgh Trust Company and Federal Reserve Bank of Cleveland having no objections thereto" (R. 16).

Proposed Plan Laid Before Banks.

On returning to Pittsburgh Mr. Weil, in accordance with the board's action, communicated with Mr. Lucas, the vice-president of the People's Pittsburgh Bank, to submit the plan to him in order to determine whether the banks had any objections. Mr. Lucas asked Mr. Weil to submit the plan in writing and on December 15, 1941, Mr. Weil had a personal interview with Mr. Lucas and submitted to him a letter, dated the same day (R. 102), which detailed the arrangement proposed by Triumph (R. 105-8), as explained above, to carry out the incendiary bomb contract. Mr. Lucas felt that he should consult the officials of the Federal Reserve Bank of Cleveland and, accordingly, he and Mr. Weil went to Cleveland and had a conference with the managing officials of the Federal Reserve Bank in that city (R. 103). The letter setting forth the proposed plan was taken along and was carefully pondered not only by the officials of the banks but by their counsel (R. 103). It explicitly stated why the plan was necessary (R. 106):

"* * * in view of the foregoing situation,—first, the refusal on the part of the banks to permit Triumph to expend approximately \$200,000 additional for capital assets" * * * etc.

Approval by Banks.

After considerable study, the banks announced that they had no objection to the proposed plan (R. 108). It was apparent that if Triumph itself had been authorized to make the required capital expenditure, the entire plan would have been unnecessary. But this alternative was never suggested by the banks (R. 113).

Plan Put Into Effect; Elk Mills Model Plant.

The plan was then put into operation, except as it had been modified at the instance of Mr. Weil, who insisted that the petitioner should not receive any stock in the new company, contrary to the informal proposal in the Feldman memo; and in fact the petitioner received no stock (R. 15, 169). Elk Mills Loading Corporation became a model plant for the manufacture of incendiary bombs. Ingenious techniques to facilitate the loading operations and other time-saving features were devised by the key men (R. 171). It was the finest plant of its type in the country (R. 172) and soon began to produce ahead of delivery schedule.

Shirley and MacBride Testimony.

Shirley and MacBride were directors of Triumph. They were both present at a board meeting on March 17, 1942, in which Elk Mills was discussed. They both testified that they heard no talk of Elk Mills at that time and did not know of this corporation until October, 1942, when the Government began an investigation of the Company for the purpose of contract renegotiation. However, a resolution which they inserted in the minutes of October 7, 1942, shows that they left the March 17th meeting before the Elk Mills discussion (R. 23-4).

The evidence further showed that it was extremely difficult to get them to attend meetings and that they were present at only one other meeting besides that of March 17, 1942 (R. 30, 179). So it is not surprising that they knew nothing about Elk Mills. These directors, it was shown, had free access to the minutes of all meetings and could easily have acquainted themselves with all previous happenings at the meetings they missed if they were interested. Evidence showing the complete lack of secrecy about Elk Mills was furnished by the government's witness, Forestell, who testified without contradiction, that the name "Elk Mills Loading Co." was at all times painted in large letters on a door in the main corridor of the Triumph office building (R. 195).

Inter-Company Accounts Accurately and Properly Kept—Triumph's Profits.

Witness Oldham, the representative of the F. B. I in charge of this investigation, stated that the inter-company accounts between Triumph and Elk Mills were at all times properly and accurately kept. (R. 137, 138). The Elk Mills profit and loss statement up to July 31, 1942 showed a profit after salaries to officers and consultants, of \$219,000, and the profits were put into fixed assets (R. 129). Triumph, in accordance with the agreement, paid all expenditures for Elk Mills, and billed Elk Mills for the sums laid out (R. 129); and on the overhead expenses, Triumph, under a supplementary agreement, charged Elk Mills 5¢ per bomb. Triumph's profits were as follows:

55% (due to ownership of that proportion of Elk Mills stock) of the \$219,000 profit made by Elk Mills (R. 138).

10% on the contract, amounting to approximately \$61,000 (R. 139).

Triumph also received the 5¢ per bomb, above mentioned, totaling \$80,000, for services rendered to Elk Mills, such as watchmen's services, office rent, secretarial expenses, etc. (R. 175). This resulted in a profit of some \$40,000 since the total actual cost of providing these services was approximately \$40,000 (R. 175).

Petitioner's Earnings.

The petitioner was made vice-president of Elk Mills. His duties pertained to administrative matters and efforts to secure independent financing and banking accommodations for the subsidiary (R. 188). For his services to Elk Mills, he received \$3,033.34 in salary and \$5,000 in bonus (R. 180). A similar bonus was paid to each of the Elk Mills officers and technical advisers (R. 83-4). (One of these bonus checks, to V. G. Willis, Jr., a consultant, is the basis of the third count). Thus, the petitioner's total earnings from Elk Mills were \$8,033.34, while his earnings from Triumph, the parent company, were merely nominal, totaling only \$1,050 (R. 157).

Defect in Title Prevents Consummation of Land Purchase for Elk Mills.

It will be recalled that the key men were to purchase a suitable site for the Elk Mills buildings, and, as consideration for transferring the land, they (petitioner not participating), received 45% of the stock of Elk Mills. It developed that there was a flaw in the land title (R. 192, 193) which required court action (R. 194) and resulted in the usual delays. Meanwhile, Triumph had taken the contract for the land in order to protect its right to a waterway (R. 192, 194). The petitioner, on his periodic visits, made repeated inquiries of the key men as to why the land had not been paid for and was from time to time informed that they were ready to pay for the land (R. 172) but

that the settlement had been held up because of the defect in title which had to be removed before the transaction could properly be completed. (R. 173).

The Lumber Deal.

During the latter part of August, 1942, when the Government began an examination of Triumph for the purpose of price renegotiation, the petitioner learned for the first time (R. 172) about the so-called "lumber deal". Mr. Stephen R. Jackson was the contractor who did construction work both for Triumph and Elk Mills (R. 45, 46). Messrs. Feldman and Deibert (R. 46-7), two of the key men, instructed him to use timber on the Elk Mills tract in constructing the buildings of that corporation. After Mr. Jackson finished work on these buildings he was told by W. L. Kann, Jr., (not the petitioner), that the timber belonged to the five key men, Feldman, W. L. Kann, Jr., Deibert, Prial and Willis, and he was given a bill of \$12,062.18 for the timber (R. 52, 54). When, contrary to his understanding, Mr. Jackson found that he would have to pay for the timber, he in turn billed Triumph in the same amount and received a Triumph check for that amount (R. 54). Jackson then gave his check in like amount to the five key men. The net effect was that money of Triumph was improperly appropriated by the key men. Jackson's check is the basis of the second count.

When, for the first time this transaction came to the petitioner's attention in the latter part of August, 1942 (R. 172) during the Government's renegotiation examination, he promptly declared that it was all wrong (R. 93, 96); that he disapproved of it; and that he would see to it that the matter was straightened out by requiring the key men to pay back the sums they had received (R. 96, 178). And the money was paid back (R. 140, 178).

The petitioner had no part in these dealings with Jackson (R. 62) and he did not receive any part of Jackson's check to the key men (R. 51). However, Jackson testified that on the occasion when he received Triumph's check for \$12,062.18 on July 21, 1942, he had discussed the matter with W. L. Kann, Jr., in the latter's office in the Triumph Building, and that on coming out of the office (R. 65-6) they met the petitioner walking down the corridor (R. 66). W. L. Kann, Jr., in Jackson's presence, asked the petitioner " * * if it was all right to pay the bill" (R. 55) (later the witness used the words "lumber bill" and "lumber account"); the petitioner replied, "I don't see why not" and walked on (R. 66). There was no explanation or discussion (R. 66) and the conversation consisted solely of the single question and answer and lasted "possibly a few seconds" (R. 63). The witness' recollection as to whether his bill was at hand during the conversation varied, but he last said that it was not present (R. 64, 60, 56). The petitioner, as previously stated, had nothing to do with construction generally or with the construction of the Elk Mills buildings specifically, nor did his duties include looking after the payment of bills (R. 62). He knew that Jackson was the builder (R. 57); that as such he was entitled to be paid in instalments from time to time, and that some of Jackson's bills *were for lumber purchased on the outside* (R. 57, 178) at about the same time.

The petitioner had no recollection of this conversation (R. 176). He denied that he was in Elkton on July 21st, the date when, according to Jackson, the conversation is supposed to have occurred, or on the 22nd (R. 176), the date of Jackson's bill. His recollection was confirmed by copies of letters sent to Baltimore during the trial from the petitioner's office in Pittsburgh, which showed that he

was in Pittsburgh and had written letters transacting business in that city on those dates (R. 177-8).

After the ramifications of this transaction were made known to the petitioner, and since the key men had not as yet paid for the land, they were required to turn back to Triumph the 45% stock of Elk Mills which they held, making Elk Mills a wholly owned subsidiary. Thus, Triumph sustained no loss.

SPECIFICATION OF ERRORS URGED.

The Circuit Court of Appeals erred in failing to hold:

(1) That the District Court for the District of Maryland erred in refusing to instruct the Jury that their verdict should be "Not Guilty" because the evidence was legally insufficient to prove fraud on the part of the petitioner.

(2) That the District Court for the District of Maryland erred in refusing to instruct the Jury that their verdict should be "Not Guilty" because the uncontradicted evidence showed that the alleged schemes were completely consummated before the mails were used and that the mails were not used for the purpose of executing said schemes.

SUMMARY OF ARGUMENT.

1. The government relied on a group of circumstances to establish the petitioner's guilt. However, their feebleness and legal insufficiency to raise any serious inference of fraud against the petitioner becomes apparent upon examination. Not only did the evidence fall far short of furnishing that solidity of proof necessary for a finding of guilt beyond a reasonable doubt, but it pointed only to innocence. The case should therefore not have been submitted to the jury for its speculation.

2. The only use of the mails was by the banks in sending the checks on to reimburse themselves after they had cashed or unconditionally advanced money on them. Assuming, *arguendo*, that a fraudulent scheme or schemes existed, and that the Petitioner was connected with it, such use of the mails does not constitute a violation of the statute on the part of the individuals cashing the checks.

A fundamental principle many times enunciated in the cases is that if the scheme has ended before the mails are used the statute is not transgressed. In the instant case the sole object and end of the schemes, as charged, was to secure money. Therefore, any use of the mails in achieving or in furtherance of that design would be punishable, but by the same token a use of the mails after the money has been received does not fall within the statutory prohibition simply because the object having been attained, such use cannot be said to have had anything to do with bringing it about.

Even if it were possible to conclude in the present case that the mails were used, in point of time, before the completion of the schemes, there would still be no violation, for the mailings had no relation whatever to the alleged schemes and were merely the efforts of the banks to secure repayment of the sums they had previously paid out. Thus, the mails were not used in the execution of the schemes, as required by the statute.

At the time the mails were used in the present case, it was beyond the power of the victim to frustrate the alleged frauds. For two very good reasons Triumph could not have stopped payment on the checks after they were negotiated to the banks and thus defeat the schemes. First,

the checks involved were not the victim's: one was Jackson's and the other was Elk Mills' and, second, and more important, when the banks cashed the checks they became holders in due course under the Uniform Negotiable Instruments Law and as such, payment could not be stopped against them. At that point Triumph was, if at all, irretrievably defrauded.

The authorities principally relied on by the government and the court below are cases in which checks were deposited with banks and the money was not obtained by the schemers until after the checks had been forwarded by mail for collection and had been paid by the drawee banks. Thus, the mails in those cases were used before the completion of the schemes and directly in furtherance to attain the object—the money; but in the present case the money was received before the mails were used and the banks thereafter used the mails to get their money back.

ARGUMENT.

I.

THE EVIDENCE WAS SO CLEARLY CONSISTENT WITH THE PETITIONER'S INNOCENCE THAT THE GUILTY VERDICT CANNOT BE JUSTIFIED AND MUST BE REVERSED.

Apart from the question as to whether the use of the mails falls within the statutory prohibition, the evidence was so weak as to the petitioner's devising or participating in any fraudulent scheme that the case should not have been submitted to the jury and therefore the conviction should be reversed. This Court has never hesitated to review a record to see whether there is competent and substantial evidence fairly tending to support the verdict. cf. *Abrams v. U. S.*, 250 U. S. 616, 619; *Mortensen v. U. S.*, 12 U. S. Law Week 4365 (decided May 15, 1944).

The Court is called upon to exercise that function here for there was no factual basis for a finding of guilt beyond a reasonable doubt.

*Use of Elk Mills Necessitated by
Limitation in Loan Agreement.*

The Government's basic concept was that the scheme to defraud consisted in the diversion of profits from Triumph to Elk Mills, the subsidiary, and eventually to the defendants, through salaries and bonuses. It was further charged that in carrying out the Elk Mills plan, certain occurrences took place which demonstrated that the formation of the subsidiary was for a fraudulent purpose.

If, however, the plan to use Elk Mills had its origin in legitimate business necessity, the government's theory that Elk Mills was formed to divert profits from Triumph must collapse.

The evidence established that Triumph, before the creation of Elk Mills, had taken a contract with the War Department to manufacture incendiary bombs which it could not fulfill because the contract required a capital outlay far in excess of the limitation in the Loan Agreement with the banks. This is undisputed.

The company was in a serious dilemma. If it cancelled the contract a ruinous law suit by the Government might have resulted or, at best, the company would have incurred the hostility of its chief customer. If, on the other hand, it went ahead and made the necessary capital expenditures itself, the banks might cancel the loan and require the full amount to be repaid forthwith. This would have been equally disastrous. What was the company to do?

Although there was no evidence to show that the banks would have sanctioned the very large additional capital

outlay required, the prosecution's position was that a direct request should have been made to obtain the necessary permission. This contention ignores the surrounding circumstances which in effect amounted to a request of that nature. The evidence clearly showed the difficulties encountered in the past in obtaining permission for capital expenditures which were inconsequential in comparison with that necessary to perform the contract. Moreover, while less than two weeks before the plan was submitted to the banks, the limit for capital outlays was raised by \$60,000, it is undisputed that on this occasion there was quite a row about the matter and the corporation was warned to "watch its step". Even this increase permitted the corporation only approximately \$6,200 additional for capital expenditures *on all its contracts* for a period of several months. To put it in the words of the petitioner: "We were in bad with the banks * * * and I don't believe we could have gotten \$25,000 additional authorization, let alone an authorization of over \$200,000." (R. 169).

The officers of the company felt there was no chance of getting the banks' permission. They decided to use Elk Mills as a subsidiary. The expenditures would then be made by the subsidiary, not Triumph, and it was hoped in this way to carry out the incendiary contract and avoid trouble with both the government and the banks. This plan was submitted in detail to the banks in Weil's letter dated December 15, 1942 (R. 105-8), which demonstrates the entire good faith of the project. The letter clearly stated why the plan was necessary:

"in view of the foregoing situation, first, the refusal on the part of the banks to permit Triumph to expend approximately \$200,000 additional of capital assets

The conferences that followed with the officials of the banks were clearly predicated on the understanding of all concerned, and the necessarily implied if not express admission on the part of the banks, that they would not authorize Triumph itself to make such a large capital outlay.

In the course of his testimony, Mr. Lucas, the banker, was asked (R. 113):

"Q: Did your counsel, or did you and Mr. Zurlinden [vice president of the Federal Reserve Bank of Cleveland] or any of your board who were considering the matter, ever suggest as an alternative that you would extend the limit of capital investment to Triumph if they would take the contract directly? A: Not in this case. It was never suggested, no. I mean it was never put up to us, therefore we never either suggested we would do it or would not".

The most that can be claimed for this testimony is that the witness did not know whether the permission would have been granted.

Just previously counsel had asked the witness (R. 113):

"Q. I will ask you whether this paragraph [of the letter] was known to you at the time to be a correct statement: 'You will further recall that when the matter was first discussed with you as to obtaining the approval of the banks, which approval is necessary under our loan agreement, for the expenditure by Triumph of approximately \$200,000 additional for land, plant and equipment, you strongly indicated that you had serious doubts as to whether either your bank or the Federal Reserve of Cleveland, would be willing to grant such approval.' That was a fair statement of the conversation, was it not?"

and he replied:

"A. I think that was a fair statement of the understanding we had with the officers of our bank at that time, but that still did not say we agreed to all of this."

Here is a rather grudging but nevertheless convincing confirmation of the banks' unwillingness to grant Triumph permission to make the required outlay. No attempt was made to conceal the fact that government advances were anticipated. The letter clearly stated (R. 107):

"The work under the new contract can be financed by Triumph securing from the Government an advance of approximately 30 per cent. on its contract with the Government, such advance thus aggregating approximately \$450,000. Triumph will agree from time to time to make advance payments to the new corporation on account of deliveries by the new corporation to it, such advances to be sufficient to pay for the plant, machinery and equipment which, as stated, should not exceed \$200,000, and the balance of such advance payments to the extent necessary will be sufficient to provide the necessary working capital for the completion of the contract."

Thus the banks were fully informed but they did not tell the Triumph officials to go ahead and use the government's advances for the necessary capital outlays. It was the banks' position that the borrowing of money from any source for capital expenditures by Triumph would have violated the loan agreement. A further glance at Mr. Lucas' testimony makes this clear (R. 110):

"Q. Mr. Lucas, even though they [Triumph] did not directly employ the money they borrowed from you in investment in land and fixed assets, but while owing you this money, borrowed from another source some money and tied it up into fixed assets, would you permit that?

"A. No. Under the terms of the loan agreement they could not borrow from another source because they were not permitted to do so."

If in the opinion of the banks the use of borrowed Government money would not have violated the loan agreement, why didn't they simply inform Triumph that the corporation would be safe in using the Government loans for capital expenditures, and so avoid the bother of making an exhaustive study of an elaborate plan which called for the use of Government money by a subsidiary?

If the banks had no objections to Triumph's making the additional capital expenditures, can it be doubted that they would have so informed Weil upon being presented the plan for the formation of Elk Mills? Yet the Record says they did not do so. The fact is incontestable that both, the bank representatives before whom the plan was so fully detailed, and Weil, acted on the premise that the permission would not be granted (R. 115). When these facts are considered the point that no *direct* request was formally made is reduced to a mere quibble.

Certainly the creation of subsidiaries to carry out certain contracts or duties for the parent company's benefit is so commonplace at this date that any lengthy citation of authorities is unnecessary.*

We submit that when the evidence is fairly examined, the conclusion must irresistibly follow that the plan for the formation and use of Elk Mills as a subsidiary was occasioned by legitimate and bona fide business necessity.

* *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537, 54 Atl. 570. In *Rubino v. Pressed Steel Car Co.* (N. J. Eq. 53 Atl. 1050), the court said:

"... A manufacturing corporation, whose articles embrace a very wide variety of business, including the purchase or other acquisition of shares of stock of other corporations may form a new corporation to conduct a similar manufacturing business, with the stock largely held by the parent company, where the purpose is to increase the business and profits of the latter. ..." Cited with approval in *Durham v. Firestone Tire Co.* (1936) 55 P. 2d 648; and see *Fletcher on Corp.*, Vol. 6, Sec. 2823.

Despite the plain facts which show the business conditions leading to the creation of Elk Mills, the Government, to make out a case, relied in its brief on a group of occurrences or "facts" which it contended proved that Elk Mills was created for a fraudulent purpose. The opinion below, without discussion, adopted this array as sufficient to raise inferences of fraud. No reasoned analysis of the evidence was, however, undertaken by the Court, and a fair consideration of the points relied on completely dispels the unwarranted inferences.

It is necessary now to take up these circumstances. The problem is crucial and cannot be swept aside as a mere "question for the jury." We earnestly contend that these circumstances, considered singly, or as a whole, negative the petitioner's guilt and demonstrate his innocence.

(a) *Additional Pay.*

In the category of improper acts, the prosecution listed the salaries and bonuses paid by Elk Mills to its officers and consultants. The undisputed evidence shows that the work under the incendiary bomb contract was carried on with great efficiency and by improvising entirely novel techniques. The key men, in their duties to Elk Mills, were doing work outside the range of their duties for Triumph. Surely they were entitled to additional compensation for their success in making Elk Mills a model plant and so supplying the vitally needed bombs ahead of schedule, which resulted in substantial benefit to the parent company as well as the subsidiary. Primarily, the amount of compensation to officers and employees is within the discretion of the directors and ordinarily the civil courts are the tribunals before which such a question is presented if a dispute arises. But this is a criminal prosecution. A

striking feature of this case is that we do not find the so-called defrauded parties, Triumph Explosives (which at the time of the indictment and trial was under new management), or its stockholders, complaining from the witness stand, and the reason is not far to seek: the undisputed evidence from the government's own witnesses shows that Triumph benefited greatly under the Elk Mills plan (R. 138, 139, 175).

(b) *Lack of Knowledge by Certain Directors About Elk Mills—Shirley and MacBride.*

In an effort to show that the plan was a clandestine one, it was asserted that three directors of Triumph knew nothing about Elk Mills until the renegotiation investigation by the government. Is this any evidence of fraud, particularly in the light of the explanation given by these directors themselves as government witnesses? Diamondstone, one of these directors, was not present at the trial and was not present at the meeting in which Elk Mills was discussed, nor is it shown that he was present at any other meeting. The other two directors, MacBride and Shirley, were both present at a meeting on March 17, 1942, in which Elk Mills was discussed, but they stated that they were in a hurry to get away and left before the discussion about the subsidiary which took place later in the meeting. It should also be noted that these two directors attended practically no meetings. In answer to the Court's question, MacBride said that he was present at only one meeting between December 11, 1941, the date of the first Elk Mills discussion, and October, 1942. The same applies to Shirley. The minutes of the corporation, which were at all times open for inspection by directors, related in detail the action taken with respect to the use of a sub-

sidiary. If these directors were at all interested, they could easily have obtained complete information about the actions taken at the meetings they missed and particularly about Elk Mills. Under these circumstances, it is difficult to understand how any fraud or inference of fraud can be drawn from their statements that they did not know about Elk Mills. These directors just did not attend to their duties, and so they knew nothing about the subsidiary.

Significantly, the evidence shows that the use of Elk Mills as a subsidiary was not a secret at all but was clearly apparent to everyone. We refer to the testimony of the government witness Forestell, who said that the name "Elk Mills Loading Co." was painted in large letters on a door in the main corridor of the Triumph office building (R. 195). If there was any intention to keep Elk Mills a secret there certainly would be no reason to advertise the name in this exposed place. And of course, the detailed account of the plan in the corporate minutes and the complete information furnished the banks are in themselves an unanswerable refutation to any suggestion of attempted secrecy.

(c) *Form of Notice to Directors.*

The government stressed that the notices of the Directors meeting at which the Elk Mills plan was approved did not specify that it was to be considered. Of course the notice of the meeting of Directors of December 11th contained no reference to the formation of Elk Mills Loading Company! The notices were sent out to announce a meeting to seek a solution of the problem. At that time it was not known what solution was possible or that a subsidiary called Elk Mills would be utilized. The testi-

mony showed that Mr. Kann received a memorandum from Feldman dated December 3, 1941, which was his first knowledge of the creation of Elk Mills, and, indeed, of the dilemma posed by the incendiary bomb contract; that a few days thereafter he consulted Mr. Weil, and requested him to come to Elkton to discuss the matter. It was not until Kann and Weil arrived at Elkton on the morning of December 11th, the day of the meeting, and talked with Decker and the five key men, that the situation was revealed with sufficient clarity to attempt a solution. Prior to December 11th the only thing that could have been set forth in the notice as one of the purposes of the meeting would have been some absurd statement, such as: "To discuss the performance of an incendiary bomb contract entered into without the President's knowledge and, perhaps, the use of a company known as Elk Mills Loading Company, formed without his knowledge and the incorporation costs of which have been paid by Feldman!"

Nor were the notices of the meeting improper. The call was in the customary broad language and it was not necessary to specify that any proposal relating to Elk Mills was to be discussed. Interpretations of the by-laws may vary, but no inference of criminality can be drawn from the mere fact that the call for the meeting did not specifically mention Elk Mills.

(d) Alleged Falsity of Minutes.

It was urged that the minutes were false because they showed five Directors present at the March 17th meeting, whereas only three were there. It is true that in order to be completely accurate the minutes might have shown that two directors left before the Elk Mills discussion. But the inadvertent omission of such a detail is certainly

not of such nature that the minutes can properly be branded as false. It is customary for secretaries of corporate meetings to note the names of those present at the opening of the meeting, and if anyone leaves before the end of the meeting, that could very easily be overlooked and so not mentioned in the minutes. Certainly failure to make such notation is no evidence of fraud on the part of the secretary or of anyone else.

(e) *Domination of Elk Mills.*

In its opinion the Court below says that Kann and two other Directors could dominate Elk Mills. Granted. The evidence shows that at Mr. Weil's instance 55% of the stock in Elk Mills was retained by Triumph to assure control for its protection. Such control would normally be exercised by the parent company's officers.

But the question of control is a false issue. It may be conceded that Kann and any two other directors could control Elk Mills, just as control is exercised in many corporations by groups of directors and there is nothing improper in this. The petitioner is not seeking to escape on the ground that Elk Mills was not used by Triumph with his full consent. His point is that this use was for legitimate reasons. The argument about "control" merely confuses the issue, and proves nothing.

(f) *Demeanor and Bearing of Petitioner.*

A fantastic attempt to show fraud (the resort to which is itself evidence of the weakness of the government's case) was the assertion that the petitioner's demeanor when interviewed, was such as to justify the idea that he was guilty. The record belies this far-fetched resort to dime-novel imagination. What appears as an undeniable

fact is that as soon as Kann was informed of the key men's improper lumber deal, in which he had no part, he acted like any honest man and immediately denounced it as wrong and insisted that the money be paid back. Not only this, but because of their breach of the agreement to pay for the factory site, he required the five men to return their stock to the company. What could be more honest or proper on the part of the defendant? And the key men did so upon the petitioner's insistence.

(g) *Letter from Weil Criticizing Minutes.*

The letter referred to clearly relates to tax matters, not to the formation of the Elk Mills Company. In this connection, it must be remembered that the plan was adopted on December 11, 1941, and the letter was written the following February, after the banks had approved the plan. Moreover, the letter demonstrates what the government attempted to disprove, namely, that according to the plan the key men were personally to pay for the land and transfer it to Elk Mills as consideration for 45% stock of that company. In testing the petitioner's state of mind this letter is a strong indication that he and his attorney fully expected the key men to pay for the land.

(h) *Use of Triumph Facilities and Employees.*

The use of Triumph's employees and facilities was arranged by contract between the corporations when it was found that such use would result in a more efficient method of operation. The F. B. I. agent, Oldham, it will be recalled, testified that the inter-company accounts were properly and accurately kept. Elk Mills paid for these services at 5¢ per bomb and it is uncontradicted that Triumph thus realized a profit of some \$40,000.00 (R. 175) in addition

to its other profits on the incendiary contract. It is difficult to understand what prompted the Court below to list this feature as justifying any inference of fraud. If anything, it is strongly indicative of the complete honesty of the arrangement.

(i) *The Land Purchase and 45% Stock to the Key Men.*

Under the agreement the five key men (of whom the petitioner was not one) were to purchase a suitable tract of land and transfer it to Elk Mills as consideration for the issuance of 45% stock of that company to them. We might add, parenthetically, that although this proportion of stock may seem large, it must be recalled that there was no certainty at the time of this arrangement that large profits would be made and, of course, it was the aim to afford these men greater pay and thus assure their continuing in Triumph's employ. It is a *concessum* in the case that a defect existed in the land title (R. 192) which required court proceedings before the transaction could be completed. The only evidence as to the petitioner demonstrates his good faith. On his periodic visits he repeatedly inquired whether the land had been paid for and was informed by these men that although they were ready and willing to pay for the land the necessity of clearing the title prevented the consummation of the transaction. Later, when the lumber manipulations of the key men (to be discussed presently) came to light, the petitioner promptly took steps to cancel the entire arrangement, and the men were required to return the 45% stock of Elk Mills which they held. Certainly there can be no imputation of fraud on the petitioner's part in this matter.

(j) *The Lumber Deal.*

The key men devised this corrupt deal but the evidence showed that the petitioner had nothing to do with it. However, in a desperate effort to connect the petitioner with this, the only fraud shown in the entire case, the government seized upon the testimony of witness Jackson. He testified that after discussing the matter with W. L. Kann, Jr., one of the key men, in the latter's office, they came out and saw the petitioner walking down the corridor. Jackson said that W. L. Kann, Jr., without explanation of any kind, asked the petitioner whether it was all right to pay Jackson's bill. The petitioner said: "I don't see why not"—and walked on.

The most minute scrutiny of the Record fails to reveal anything else which has even the slightest tendency to prove the petitioner's knowledge of the lumber deal.

The law is well settled that an officer of a corporation cannot be held criminally responsible for illegal acts of other officers in which he never joined or knowingly sanctioned.*

The government, therefore, was forced to rely completely on this bit of testimony in its attempt to connect the petitioner with the scheme. The testimony of the witness was elicited piece-meal and covers many pages of the Record. His recollection varied considerably depending on who was conducting the examination, and on at least two occasions the trial court remarked on the evi-

* In *State v. Thomas*, 123 Wash. 299, 212 P. 253; it was said:

"The general rule is that where the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of the corporation that he actually and personally do the acts which constitute the offense or that they be done by his direction or permission." See also: *State v. Carmean*, 126 Iowa 291, 102 N. W. 97; 13 *Amer. Jurisprudence*, Sec. 1100, p. 1027; 13 *C. J. S.*, Sec. 931—Criminal Responsibility.

dent confusion in his testimony (Tr. 170, 188)* The witness said that W. L. Kann, Jr., one of the key men, in his presence, discussed it with the petitioner (R. 55):

"Q. What did he discuss in your presence? A. Just asked him if it was all right to pay *the bill*." (Italics supplied).

and again:

"A. He, W. L. Kann, Jr., just asked Mr. Gustav Kann if it was all right to pay this bill, and he said he didn't see why not."

Later the witness said that the words "lumber bill" or "lumber account" were used, but still later the witness was asked (R. 65):

"Q. You knew you were talking with William L. Kann, Jr., about the lumber bill? A. That is right, about the lumber account.

"Q. And you naturally assumed that what he said to his uncle in this brief, hurried conversation in the corridor, also referred to the lumber bill? A. That is right."

So that here the witness assumes that the word "lumber" was used because that was what he had been discussing with one of the key men.

As to whether he had the bill with him at the time of the conversation, the witness stated that he "couldn't say that he (W. L. Kann, Jr.) had the bill in his hand". (R. 56). His testimony later, however, seemed to infer that a bill was present, but later still (R. 60, 62) he stated positively that he had no bill when the conversation took place (R. 64); so that it cannot even be said that the subject matter

* The reference is to the Transcript of Record on file in the clerk's office which may be referred to under the stipulation between the parties hereto (R. 241).

of the single, fleeting question asked of the petitioner was understood by him.

The witness was asked: (R. 69)

"Q. Was there anything said in this short corridor conversation, when you say there was talk about the lumber bill, that that was lumber that you were paying these five men for and not lumber that you bought from dealers on the outside? A. There was nothing said, only what I told you.

"Q. No explanation that this lumber bill had anything irregular about it, or that you were paying these men? A. Just the lumber account, that is all that was said."

The petitioner said he did not recall any "conversation" of this sort. Of course, a single question and answer such as this could easily be forgotten. Especially if the petitioner knew nothing of the fraud no particular importance would be attached by him to this perfunctory question. His memory as to his whereabouts when this conversation is supposed to have taken place, was refreshed by copies of letters rushed to him during the trial from his office in Pittsburgh, which showed that he was not in Elkton on that day but was in Pittsburgh transacting business (R. 177-8).

But even if the conversation did take place it would not indicate knowledge of the fraud for it is entirely consistent with the petitioner's complete innocence of any wrongdoing. Let us again recall Jackson's uncontradicted testimony that the petitioner had no dealings with him and had nothing to do with construction or payment of bills (R. 62); that the petitioner knew that the witness was the builder (R. 57) and as such was entitled to be paid in

instalments for work and materials; that some of the witness' bills were for lumber purchased by him on the outside at about the same time (R. 57-59); that the petitioner was not present when the key men directed the witness to make out a check to him (R. 57); that the petitioner was not one of the payees; that nothing was said in his presence about reimbursing the key men (R. 57).^a

With this uncontradicted evidence in mind, when the petitioner while walking down the corridor was asked if it was all right to pay a bill and no explanation was given, could there have been a more spontaneous and innocent response than to say the words ascribed to him—"I don't see why not"—and then continue on his way? To gather from this, passing, one-sentence question and answer, "on the wing" as it were, a solemn finding that the petitioner knew of the lumber deal is to torture a meaning out of a perfectly innocent occurrence so far as the petitioner was concerned. The circumstances raise no inference other than that of innocence.

It is noteworthy that none of the key men, who had pleaded *nolo contendere* and were in Court seeking the favorable recommendation of the prosecutor, was called to the stand to supply a single fact implicating the petitioner in the lumber deal. If any such fact existed this source would certainly not have been neglected by the Government to bolster the Jackson testimony, which is so grossly attenuated that it lacks any probative force.

The Court below declared that whatever may be the effect of an analysis of each occurrence brought forward by the prosecution to show fraud, the composite picture of all clearly proved fraud. Composite picture of what? Of circumstances either fully explained or the deductions

from which were more consistent with innocence than guilt? Resort to such sweeping generalization cannot take the place of reasoned analysis of evidence to demonstrate that the circumstances were inconsistent with innocence. But such analysis the Court below did not undertake to make.

The evidence was not merely consistent with innocence, which under the authorities is sufficient ground for reversal*, but it was entirely inconsistent with any other conclusion.

II.

THE EVIDENCE SHOWS THAT THE SCHEMES ALLEGED IN THE INDICTMENT WERE COMPLETE BEFORE THE MAILED WERE USED AND THE MAILED WERE NOT USED FOR THE PURPOSE OF EXECUTING THE SCHEMES.

The Jackson check set forth in the second count was cashed by the key men, while Willis' bonus check in the third count, was endorsed without restriction and deposited in the Newark Bank. At the trial in the District Court and on appeal, the Government in its briefs, and the Circuit Court in its opinion, made no distinction between the checks, because in the present case there was no evidence of any special agreement with respect to the deposit of Willis' bonus check and legally, in the absence of such special agreement, the unrestricted endorsement of the bonus check and its deposit in the bank is equivalent to cashing it; and thereafter, when the bank, as the purchaser of the check, sent it on for collection it was acting on its own

* *Chambers v. U. S.*, 237 F. 513:

"Where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. *Harrison v. U. S.*, 200 F. 662; *Isabel v. U. S.*, 227 F. 788."

behalf and not as agent of the payee.* We shall therefore follow that treatment.

Broadly speaking, the decisions fall into two categories: first, those in which the mails are used after attainment of the object of a scheme; and, second, those in which the mails are used to effectuate the scheme.

In the first mentioned group, the decisions uniformly hold that the statute is not transgressed. The instant case is within this class because the acquisition of the money, which was the sole aim of the alleged scheme, was not brought about by the use of the mails but was accomplished before they were used.

As is apparent, the decisions in the second group, with equal uniformity, hold that the statute is violated. The cases on which the government relies are all embraced in this group, but they are inapplicable because as we shall show, the case at bar is not within this category.

The object of a scheme must be borne in mind, for when it is achieved the scheme is a fully executed one. The sole object here alleged was the receipt of money and the schemes, therefore, came to an end when the money was

* In *Burton v. U. S.*, 196 U. S. 283, 297 (1905) (Op. by Mr. Justice Peckham), this court decided that, in the absence of a special agreement, when a check was deposited in a bank and the amount credited to the depositor, the bank became the owner, and when it mailed the check for collection its action "was not a collection for defendant (payee) by the bank as his agent. It was sent forward to be paid and the . . . bank was its owner when sent."

To the same effect, in *City of Douglas v. Federal Reserve Bank of Dallas*, 271 U. S. 489, 492 (1927) (Op. by Mr. Justice Stone): "For when paper is indorsed without restriction by a depositor, and is at once passed to his credit by the bank to which he delivers it, he becomes creditor of the bank; the bank becomes owner of the paper, and in making the collection is not the agent for the depositor."

And see *Dakin v. Bayly*, 200 U. S. 143, 146 (1943) (Op. by Mr. Justice Roberts): "In the ordinary case, the unrestricted endorsement and deposit of checks with the . . . bank would create the relation of debtor and creditor, and the bank would collect the items not as agent for the depositors, but as owner."

received. It is submitted that in the instant case any other criterion for determining when the schemes ended would be artificial and not in accordance with the law.

In deciding whether a scheme was ended before the mails were used, the cases often speak of the victim's ability to frustrate the plot. If the victim still has the power to retract or stop payment on a check secured by fraud, the scheme is still incomplete and any mailing at this stage may be in furtherance of the scheme. In the case at bar, however, the supposed victim, Triumph, could not stop payment because, first, as a practical matter, the checks in the indictment were issued by Jackson and Elk Mills; and, second, and more importantly, under the Uniform Negotiable Instruments Law, in force both in Maryland, where the Jackson check was cashed, and in Delaware, where the Elk Mills bonus check to Willis was endorsed without restriction and deposited, when the banks accepted the checks they became holders in due course and as such payment could not be stopped against them:

"A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."*

The case of *U. S. vs. Kenofskey*, 243 U. S. 440 (1917), dealt with the mailing of a fraudulent letter rather than a check, but it supports our contention that a scheme like the one here charged ends when the money is received. There the schemer, an employee of an insurance company, presented to his superior a false letter and proof of death,

* Art. 13, Sec. 76, Anno. Code of Md. (1939).

Dean vs. Eastern Shore Trust Co., 159 Md. 213.

Sec. 3181, Chapter 78, Art. 4, Sec. 57, Revised Code of Del. (1935).

intending that the latter should then mail the false matter to the home office where the claim had to be approved before payment could be made. It was argued that the scheme was completed when the false claim was handed to the supervisor; but this Court rejected that contention, saying: (p. 443)

"We do not think the scheme ended when Kenofsky handed the false proofs to his superior officer * * *. The most vital element in the transaction both to the insurance company and to Kenofsky remained yet to become an actuality, that is, the payment and receipt of the money; * * *. *Such payment and receipt would indeed have executed the scheme but they would not have served to 'trammel up the consequence' of the fraudulent use of the mails.*" (Italics supplied.)

Thus, in the quoted language we have emphasized, this Court recognized that the payment and receipt of the money would have ended the scheme; and although such payment and receipt *after* the mailing could not defeat the prosecution in the *Kenofsky* case because the use of the mails there preceded and was the means of accomplishing the payment and receipt, in the instant case, the receipt of the money by the payees of the checks occurred before, and was not brought about by, the use of the mails.

In *Stapp vs. U. S.*, 120 F. 2d 898 (C. C. A. 5) (1941), one Christian, the victim, was induced to believe that the defendant Stapp was an agent of an oil company authorized to buy an oil lease for it from the defendant Rudder for the price of \$8,000, but that Stapp could really buy the lease for \$4,800. The proposal was made and accepted by Christian that he buy it from Rudder for \$4,800 and in turn Stapp would buy it from him for his principal for \$8,000, the illicit profit of \$3,200 to be divided between Christian and Stapp. Christian went to the Pauls Valley Bank with

a letter of credit issued by the Tyler Bank. He purchased a cashier's check of the Pauls Valley Bank with a check drawn on the Tyler Bank and bought the lease which subsequently proved valueless. Rudder accepted the cashier's check, payable to himself, and the next day cashed it at the Pauls Valley Bank and received the money. In the regular course of business, Christian's check drawn on the Tyler Bank and the letter of credit were sent through the mails by the Pauls Valley Bank for its reimbursement.

The Court recognized that a mailing may be made the basis of a prosecution even though done by an innocent agent, but insisted that it is vital to the commission of the offense that the mailing be in furtherance of the scheme. The mailing was held not to be "in furtherance" because the victim had already been defrauded.

The Court said: (p. 899)

"In this case it is apparent the purpose of the scheme to defraud Christian had been completely accomplished when the Pauls Valley Bank accepted his check on the Tyler Bank and the money was paid to Rudder. Christian was then and there defrauded. Up to that point the mails had not been used at all. Christian could not have legally done anything to stop payment of his check and was obligated to reimburse the Pauls Valley Bank for cashing it. While the mails were incidentally used, the defendants had no interest whatever in that transaction."

In the present case there could be no retraction after the checks were cashed because the banks then became holders in due course. The payees had already received the proceeds and were completely indifferent whether or not the mails were thereafter used by the banks for their own reimbursement.

In *U. S. v. McKay*, 45 F. Supp. 1001 (1942) (D. Ct. E. D. Mich.), the scheme was one to defraud the contributors to the campaign of Governor Fitzgerald. McKay falsely represented by means of spurious unpaid invoices that a large deficit was due an advertising agency for services rendered during the campaign. The scheme, aimed at great numbers, was successful in at least one case, that of Edsel Ford, who made two separate contributions by check at different times. Both checks were deposited and cashier's checks secured. The banks then mailed the checks deposited with them for clearance.

In sustaining the demurrer and dismissing the indictment, the Court declared: (p. 1005)

"The statute specifically provides that the United States mails must be used 'for the purpose of executing such scheme or artifice or attempting so to do.' It is vital to the commission of the offense that the use of the mail relied upon by the Government be in furtherance of the alleged scheme. The demurrer to the indictment attacks its validity on the ground that the indictment shows on its face that the use of the mails relied upon by the Government in each count was not for the purpose of executing the scheme or artifice charged, but on the contrary occurred after the completion of the alleged scheme and at a time when the fraud, if any existed, had been fully perpetrated. * * * If the scheme charged was completed before the mail was used, the offense denounced by Section 215 of the Criminal Code does not exist." (Italics supplied.)

In the instant case, as in the *McKay* case, the money was received before the checks were mailed.

Said the Court in that case: (p. 1006)

"Under the authorities above referred to, and with particular reliance upon the recent decision of the Cir-

cuit Court of Appeals for the Fifth Circuit in *Stapp v. United States, supra*, the Court holds that the subsequent mailing of the check by the bank in question in order to reimburse itself for the funds it had paid out does not constitute a mailing in furtherance of the scheme charged in the indictment, and that the demurrers to the two counts of the indictment should be sustained." (Italics supplied.)

So, in the case at bar, the banks subsequently used the mails for their own reimbursement.

In *Dyhre v. Hudspeth, Warden*, 106 F. 2d 286 (C. C. A. 10) habeas corpus was brought after plea of guilty. The attack was on the indictment and raised the precise point presented on the Record here. The indictment alleged that the defendant represented he had bank accounts in certain banks and issued checks for various amounts payable to the persons to be defrauded, although in fact he had no money on deposit and no intention that the checks should be paid; and that "in and for executing the scheme" caused checks to be sent and delivered through the mails.

The Court said: (p. 288)

"The fraud charged in each of these counts standing alone is not within the jurisdiction of the federal court, but it may be brought within that jurisdiction by charging that defendant used the U. S. mail 'for the purpose of executing such scheme or artifice or attempting so to do.' That was charged here, but the charge clearly shows that the U. S. mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until after the defendant had induced the parties named to accept his fraudulent check for merchandise. He had thus accomplished all he set out to do in falsely representing that he had

money on deposit in the banks." (Italics supplied).
Citing among other cases:

McNear vs. U. S. (C. C. A. 10), 60 F. 2d 861,
where the prosecution failed because the
scheme was complete before the mailing.

*The "Continuing Scheme" theory now
Advanced is Unavailable to
the Government.*

Despite the manifest completion of the alleged schemes before the mails were used, the Government has now evolved a theory of a "continuing scheme". It is argued that the issuance of bonuses by Elk Mills, and the lumber deal, were both part of a general, continuing scheme to defraud Triumph, which was intended to continue "at least as long as Elk Mills was performing the incendiary contract". The contention is thus advanced that the checks were mailed during the life of, and in furtherance of, the fraud.

Although the prosecution prepared this case with painstaking thoroughness for several months before the trial, no argument on "continuation" was made at the trial and this contention merely took the form of a bare suggestion in the Government's brief on appeal, but was not argued or pressed. However, the Circuit Court, in its indiscriminating adoption of every point presented by the Government, swept this up along with the rest and stated that the evidence in the case showed the scheme to be a continuing one but did not elaborate or explain why that was so. The Government has now seized upon this theory to justify the submission of the case to the jury, but the facts and circumstances in this case negative any theory of that nature.

The Government's belated "continuing" theory is based on nothing in the record and exists only in the prosecution's

imagination. The petitioner respectfully submits, moreover, that even if such theory has any validity, it still does not meet the insurmountable objection that the mails were not used in execution but that, at most, the mailings were purely incidental to the alleged scheme or schemes.

The checks resulted from two totally different and isolated transactions, having no relation to each other, and the indictment segregated each check in a separate, independent count, treating them as distinct. Jackson's check resulted from a fraudulent lumber manipulation by the key men, which was doubtless a fraud but unrelated to the incendiary bomb contract; whereas Willis' bonus check was issued by Elk Mills, which was formed to carry out the bomb contract and, in fact, did so. Nothing appears in the record which has the slightest tendency to show any link between the two. The mere assertion now that a connection exists is not sufficient to establish the essential nexus without which, it is submitted, a continuing scheme cannot properly be found. If this were not so, it would be entirely within the Government's power, in any mail fraud case, simply to urge that a particular use of the mails, no matter how isolated, was part of a continuing scheme and thus render unnecessary the determination of whether the scheme was fully consummated before the mails were used. This would inevitably result in a nullification of the clear Congressional intention that the offense does not exist unless the mails are used "for the purpose of executing the scheme," and thus the Act would be converted into a drag-net for Federal prosecution of practically any fraudulent scheme. The Government's proposition, if accepted, would result in such an unwarranted extension of the statute that it should meet this Court's instant rejection.

It should also be noted that on several occasions during the trial in the District Court, the Judge commented on the weakness of the proof on the use of the mails in furtherance, in contrast with the proof in another case tried shortly before the present one, in the same Court, where it was conceded by all that a continuing scheme was shown, and which the Government was seeking to assimilate to the present case (R. 200, 201, 202, 206). The trial judge recognized that in the instant case the situation was distinct from that in the case cited by the prosecution and impliedly agreed that here the scheme or schemes could not be regarded as continuing.

The opinion of the Circuit Court also cited the mailing of "letters" to the Postmaster at Elkton, Maryland as evidence that the unlawful use of the mails was contemplated. The reference is to a letter sent by Elk Mills to the Postmaster, asking that all mail for Elk Mills be placed in the post office box of Triumph. The stipulation (R. 37) showed only one letter of that nature. It should be noted, however, that Judge Chesnut in his charge to the jury said the letter merely showed that Elk Mills "as every bona fide business corporation, naturally expected to use the mails" (R. 223). It was so clear that this letter had no possible relevancy on whether the mails were used in executing the alleged scheme that the Judge instructed the jury to disregard it (R. 228), and the prosecution did not object to the Court's action. Evidently the appellate court overlooked this ruling when it commented on the "letters."

Even if it were possible to conclude in the present case that in point of time the mails were used before the completion of the scheme or schemes there would still be no violation because the statute requires a use of the mails in execution of the scheme or schemes. Here the mailing

had no relation whatever to the alleged schemes but were merely the efforts of the banks to secure repayment of the sums they had previously paid out. So far as the success of the scheme was concerned, therefore, the banks' disposition of the checks was completely immaterial for the money had already been received. Thus the use of the mails might, at most, be said to have resulted from, or have been an incident of, the alleged schemes, but such use is insufficient to support a conviction for the statute peremptorily requires that the mails be used for the purpose of executing the schemes.

Well reasoned decisions support this statement. In *Spillers v. U. S.*, 47 F. 2d 893 (5 C. C. A. 1931), the defendant was charged with using the mails in furtherance of a scheme to defraud by the sale of vending machines and the payment of fictitious profits. Five checks purporting to be profits from the machines were sent by mail to one of the defrauded parties in another state. These checks were deposited in a bank which in turn mailed them to another bank. The latter mailing was the basis of the prosecution. The Court held that the statute was not violated, pointing out: (p. 894)

"However, it is not every incidental use of the mail that occurs as a result of the scheme that would constitute a violation of the law. The letter must be knowingly mailed or be caused to be mailed in furtherance of the scheme. . . ." (Italics supplied.)

This was said by a court which expressly advocated a broad interpretation of the statute and approved the doctrine that the use of the mails by an innocent agency in furtherance of the fraud resulting from a train of events set in motion by a defendant, would be sufficient to transgress the statute.

In *U. S. v. McKay, supra*, the Court recognized the same principle and wrote: (p. 1005)

"* * * Defendant relies upon the well settled rule that the mailing of a letter or check, *even though connected with or relating to a scheme to defraud, if not for the purpose of executing the scheme will not support an indictment under the statute.*" (Italics supplied.)

And see

Stapp v. U. S., supra.

Cases Relied on Below.

The Circuit Court cited its own decision in the case of *Tincher vs. U. S.* (4 C. C. A.) 11 Fed. 2d 18, as authority for holding that the mailings in the present case were in furtherance of the fraud. But in the *Tincher* case the money was not obtained until after the checks had completely cleared, whereas the collection of the checks in the instant case was immaterial to the payees since the proceeds were already in their possession before the use of the mails. The indictment in the *Tincher* case consisted of four counts. The first was based on the use of the U. S. mails, during the promotion of the fraud in transmitting a letter containing a lease and note. This use of the mails was the foundation of the entire fraudulent scheme. It will be found by reference to the record and briefs as well as the opinion, that this aspect of the case was treated by the Court and by counsel on both sides as the very heart of the charges against the defendants, and that the other counts were relegated to a completely subsidiary position.

The remaining counts in the *Tincher* case involved the use of the mails in connection with checks of \$7,000, \$3,000, and \$1,000 respectively. The record indicates that these checks were cashed, not deposited for collection. How-

ever, this point was evidently not brought to the Court's attention. A close examination of the opinion reveals that the Court treated the transaction regarding these three checks as deposits for collection; in other words, that the mailing was necessary to effect the essential part of the entire scheme, namely, the receipt and division of the money. Following this line of thought, it would be necessary for the bank in which the checks were deposited, to forward them for payment before the money could be secured by the defendants. If this were not the Court's interpretation of the facts of that case, there would be no point in the court's statement at page 21:

*** the defendants caused the checks to be deposited in these banks with knowledge that the mails would necessarily be used in their collection, and the collection of the checks was a necessary part of the working out of the scheme. In fact, it was through the collection of these checks that the defendants collected and divided the spoils of their fraud." (Italics supplied).

Now, it is perfectly obvious that a deposit of checks by individuals "for collection" by one bank from another bank in reality means that the loot is not available until after the checks are collected and the funds forwarded to the bank in which the checks were deposited. That the court had such a situation in mind is apparent from its language.

To substantiate this statement we respectfully point out that the court in the *Tincher* case cited with approval and as authority for its position on this aspect of the case the following cases: *U. S. vs. Spear*, 228 F. 485 (C. C. A. 8, 1915); *Shea vs. U. S.*, 215 F. 440 (C. C. A. 6, 1918); *Savage vs. U. S.*, 270 F. 14 (C. C. A. 8, 1920).

In these cases, however, the checks were deposited (not cashed) and the money was not obtained by the depositors until after the checks had been forwarded by mail for collection and had been paid by the drawee banks. The mails were therefore used to achieve the object of the schemes, i. e., to obtain the money.

We have precisely the opposite situation in the instant case, for here the checks were cashed and never sent through the mails for collection on behalf of the payees.

We respectfully submit, therefore, the *Tincher* decision does not support the action of the Circuit Court in the present case.

Another case which the Court below cited is *Hart vs. U. S.* 112 F. 2d 128 (C. C. A. 5, 1940). Hart, one of the defendants, deposited a \$75,000 check, which had been previously obtained by fraud, in the Whitney National Bank of New Orleans. The check was thereafter forwarded through the mails in the ordinary course of business. The Court, in affirming the conviction, said: (p. 131)

"The scheme to defraud was not at an end when Hart endorsed and presented the checks to the bank for no one had yet been defrauded. L. S. U. * * * the state and its taxpayers, sustained no actual loss until the checks had been finally paid, and it is clear that before the L. S. U. account was charged with this item the University might have intervened to stop payment and the fraudulent scheme would have been frustrated."

Of course, if the victim still had the power to stop payment on the check, the Court's decision was correct. The opinion does not clearly indicate whether the proceeds of the check were immediately available to the depositor after the check was negotiated to the bank, or whether, as

is more likely, the funds were not received until after the mails were used. In the latter instance, the decision would simply fall within the *Tincher* category and cannot be considered as an authority adverse to our contention.

On the other hand, if the Court had the first situation in mind and meant to rule that despite the negotiation of the check to the bank and the unconditional appropriation of the funds to the payees, the drawer (the victim there) could have retracted and stopped payment, its decision was incorrect. It is beyond question that under such circumstances the bank becomes a holder in due course and under the Uniform Negotiable Instruments Act payment could not be stopped against it.

Whatever the fact situation was in the *Hart* case, it is clear that in the case at bar, upon the negotiation of the checks, the banks became holders in due course, and thereafter the victim no longer had the power to stop payment and was defrauded beyond recall. Consequently, the alleged schemes were then and there complete.

It should also be observed that the *Stapp* case, decided by the same Court (C. C. A. 5) after the *Hart* case clarifies the position of the Court and expressly adopts the rule that the use of the mails by a bank to reimburse itself after cashing a check, cannot be made the basis for prosecution under the mail fraud statute.

The case of *U. S. vs. McKay*, previously discussed, clearly points out what we urge here, and in commenting on the *Hart* decision says:

"In relying upon and following the decision in the case of *United States vs. Stapp*, the Court is not unmindful of the earlier ruling of the same court in *Hart vs. United States*, which apparently is in con-

flict with its later ruling in the *Stapp* case. But the apparent conflict does not really exist when the opinion in the *Hart* case is carefully considered. It expressly recognized the rule that a use of the mail after the fraud was complete fails to bring the case within the statute, but held that the scheme to defraud in that case 'was not at an end when Hart indorsed and presented the check to the bank for no one had yet been defrauded.' Its ruling was expressly based upon its interpretation of the law as applied to the facts before it, which, whether it was correct or incorrect, was that the drawer of the check 'might have intervened to stop payment and the fraudulent scheme would have been frustrated.' In both the *Stapp* case and the present case, it was beyond the power of the victim to intervene and stop payment on the check which was the subject of the mailing."

Summing up, the alleged schemes were complete when the checks were cashed and therefore the later mailing of them could not be in execution; and, further, the use of the mails by the banks had no relation to the schemes and was therefore not in furtherance thereof.

CONCLUSION.

On the Record, we confidently assert that the Court will find that a legitimate business reason necessitated the use of Elk Mills as a subsidiary of Triumph. There was absolutely no fraud in this arrangement and the subsidiary proved financially beneficial to Triumph and its stockholders. In the ensuing transactions which the Government contends showed fraud, with the exception of the lumber deal, no fraud in reality was intended or perpetrated. As to the lumber deal, the evidence disclosed a fraudulent scheme by the key men, but the petitioner knew nothing about it until a later date, when he immediately

took steps to compel and actually secured repayment of the money to Triumph.

With respect to the mailings, the evidence showed that the checks were mailed after the alleged schemes were complete and not in furtherance, because the use of the mails was by the banks for their own reimbursement. Hence, the case should have been withdrawn from the jury.

In view of the complete absence of any proof of guilt, it is plain that the verdict of the jury and the decision below were arrived at by piling inference on inference, a practice often condemned by this Court. We can only point to the present war period, with the inevitable tendency to indiscriminating severity in any matter relating to the manufacture of munitions, as explaining, but not justifying, the verdict.

The decision below should be reversed.

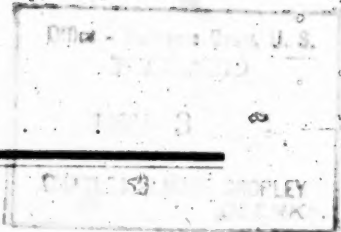
Respectfully submitted,

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Attorneys for Petitioner.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 35.

GUSTAV H. KANN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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<i>United States v. Kenofsky</i> , 243 U. S. 440	15, 19, 31
<i>United States v. Lowe</i> , 115 F. (2d) 596	19, 21, 28
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<i>United States v. Riedel</i> , 126 F. (2d) 81	20
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<i>Wharton's Criminal Evidence</i> , Vol. 1, Sec. 64	10
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 35.

GUSTAV H. KANN.

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

Before considering the points made by the Government, it is necessary to make some comment on its method of stating certain important facts in the case, creating suspicion of wrongdoing where none actually existed.

For instance, on page 4 of the Government's brief, it is said that the memorandum from Feldman "suggested" a plan for the organization of Elk Mills, whereas the fact was that Feldman did not suggest the plan to the petitioner, but *presented* him with a plan. Before receiving this memorandum, the petitioner did not know that Triumph had been awarded the bomb contract or that Feldman had

already formed a corporation known as Elk Mills and had paid the incorporation costs; and when he received the memorandum he then acted as any other sensible business man, and consulted the corporation's counsel. The Government's statement of the occurrence could leave the impression that the petitioner knew about Elk Mills before the memorandum was presented to him, but the record shows without contradiction that he did not know of it until that time (R. 165).

Much of the Government's criticism centers on the March 17, 1942 meeting of Triumph's board of directors. During that meeting an agreement was approved which provided for Elk Mills to pay Triumph a stated amount per bomb, for overhead, and it is undisputed that Triumph realized a profit on this arrangement. The Government complains that when this arrangement was approved, a quorum was not present, but it is important to bear in mind that during the meeting of December 11, 1941, in which the plan for the use of Elk Mills as a subsidiary was first approved, the Government concedes that a majority of the board was present (Gov. Br. 5).

In an effort to show that the banks would have approved the substantial investment in capital assets required to carry out the bomb contract and also to raise the employees' salaries, the Government cites the action of the banks in raising the capital limitation and in paying bonuses to the employees several months after the Elk Mills plan was put into operation. However, such action undertaken at a later date has no relevancy on whether the banks would have permitted Triumph to make the necessary expenditures when they had to be made, namely, several months before the actions cited.

It is said (Gov. Br. 8) that the bonus of five thousand dollars to the defendants was "allegedly" in recognition of

their work in eliminating delays in production. The record shows that the delays in production were not "allegedly" but *actually* eliminated, and that Elk Mills became a model plant for the production of incendiary bombs.

On page 9, the Government's brief states that Triumph advanced forty thousand dollars to Elk Mills and that thereafter this sum was paid to the defendants in the form of bonus checks. This statement is true, but there is nothing sinister in this action. This advance was made in accordance with the plan approved by the banks, and the evidence established that not only this sum but all advances by Triumph to Elk Mills were fully repaid and, in addition, Triumph realized a substantial profit.

The Government's narration of the facts connected with the purchase of the land site for Elk Mills is also misleading. The fact that Triumph made a down payment on the site has no particular significance, since the corporation was trying to protect its rights to a waterway (R. 192). The evidence shows that the five key men were ready to pay for the land and, in fact, Forestell, the Government witness, testified that they had given him their checks for the land. The reason their checks were not used was not, as the Government says, "apparently for the reason that the Elk Mills transaction had been discovered by Commander Seidman," but because of the key men's improper manipulations, the entire arrangement was being cancelled and they were being required to return their stock and the fruits of their fraudulent lumber scheme, and all the property of Elk Mills was being transferred to Triumph. Nor is there any significance in the Government's statement that a deed to the property from Triumph to Elk Mills, dated October 1, 1942, was never recorded. Inasmuch as the decision was to cancel the arrangement be-

tween Triumph and Elk Mills, and make Elk Mills a wholly-owned subsidiary, naturally the deed would not be recorded.

The prosecution says (Gov. Br. 12) that when the lumber deal was uncovered the petitioner denied any knowledge of the deal, and the record bears this out. Then the Government says that the petitioner stated "that all parties would be willing to undo what had been done." This method of statement seems to have been employed to convey the thought that the petitioner included himself, or that he was so well acquainted with the attitude of the guilty parties that he could speak for them. The evidence, however, shows that the petitioner learned of the improper lumber deal during this very conversation, and was therefore not in a position to speak for the five individuals who had received the money from the lumber deal. He did state that it was all wrong, and he would see that the money was returned. The petitioner said this, not, as the Government would have the Court infer, because he knew all about the transaction and knew that these men would pay the money back; but he clearly meant that he would use his influence with the five men and insist that they return the money.

ARGUMENT.

I.

The matters referred to by the Government as establishing the existence of a scheme to defraud, and the Petitioner's participation therein, were insufficient to justify submission of the case to the jury.

The fact that the Judge charged the jury fairly, so far as the rights of a defendant are concerned, and told the jury that they had to find fraudulent intent on the part of the petitioner, does not dispose of the question as to whether

there was sufficient evidence in the case on which the jury could fairly base a determination that the petitioner acted with fraudulent design. The Government says that there was evidence tending to contradict the *bona fides* of the plan for the use of Elk Mills as a subsidiary. Mention is made that the bank customarily approved Triumph's requests for permission to grant increases in salaries, but the Government doesn't refer to the fact that these increases were very small and entirely unsatisfactory to the men. Furthermore, the chief motivating reason for the entire plan was the bank's limitation on capital expenditures by Triumph. If only the matter of the men's dissatisfaction with their salaries was concerned, the plan would never have been proposed.

The Government asserts (Gov. Br. 19) that there was no evidence that the dissatisfied employees had sufficient assets or credit to enable them to organize a competing organization, but neither was there any evidence to the contrary. Moreover, the Government's assertion entirely overlooks the fact that the incendiary bomb contract which was awarded to Triumph expressly set forth that the Government would advance up to 30% of the face amount of the contract. Triumph financed the work through this advance, and it is manifest that the same thing could have been done by the key men through their own company. The evidence does pointedly show the initiative exercised by these men through one of them, Feldman, in incorporating Elk Mills without seeking the sanction or approval of the petitioner. Whether they intended to leave Triumph and embark on a business of their own, under the name Elk Mills, is not known.

The Government says (Gov. Br. 19) that the banks would have agreed to almost any plan which would have enabled Triumph to perform its Government contracts.

The misleading nature of this statement is apparent when it is recalled that the letter which Mr. Weil presented to the banks explicitly stated that the plan was necessary because they, the banks, would not permit Triumph to expend the large sum necessary for capital assets. If the banks were ready to sanction any sort of plan as the Government contends (Gov. Br. 19), why didn't they simply tell the Triumph officials that it would be satisfactory for the corporation to make the necessary expenditures, without troubling to consider, as the evidence shows they did, with such care, the details of the plan which called for the use of Elk Mills as a subsidiary. It is true that the bank had previously approved increased capital expenditures by Triumph, but those increases were for comparatively trivial sums whereas, to carry out the bomb contract, Triumph had to expend almost the equivalent of its total authorization up to that date. Nor does the Government mention the unquestioned hostility of the banks at the time when the permission to make the additional investment was necessary. Only a week before, Triumph had received sanction for the expenditure of sixty thousand dollars more in capital assets, but that "authorization" was granted only because it was found that Triumph had already exceeded the limit under a mistaken interpretation of the limitation, and the record shows that on that occasion Triumph was warned to "watch its step" and was informed that the banks would not tolerate the corporation's exceeding its authorization.

The fact that some months after the Elk Mills plan was approved and its success had been demonstrated, the bank authorized capital expenditures of more than double is not the point we are concerned with, and it is entirely irrelevant, for the attitude of the banks when the contract had to be carried out or breached, that is, when the plan was

presented to the banks—the situation at that time should be borne in mind in testing the honesty of the plan for the use of Elk Mills. Moreover, the fact that the banks in May, 1942, authorized the increase in capital expenditures does not show that they would have permitted Triumph itself to make the outlay necessary for the performance of the bomb contract in December, 1941, for when the banks authorized the increase in May, 1942, the company's business was many times what it was in December, 1941, and at that time the loan, and with it the limitation, was extended for another year, to June 1, 1943 (R. 119).

Realizing the manifest weakness of its statement that the jury was somehow justified in inferring fraud from the circumstances recited above, the Government proceeds to argue that even if the organization of a subsidiary was justified, the way in which Elk Mills was actually organized and conducted shows that it was used in carrying out a scheme to defraud. The Government says that the fact that a legitimate device is employed does not exonerate individuals who use such a device as the vehicle for a scheme to defraud, citing many cases in support of that plain proposition of law. Of course, we agree with this as a theoretical statement of law, but it has no application to this case. The fact that Elk Mills was set up as a subsidiary to subserve an entirely legitimate business need and to extricate Triumph from a serious dilemma must constantly be borne in mind, for it provides the ready answer to the Government's assertions of fraud. The observation is ventured that if the affairs of practically any corporation were subjected to the searching scrutiny practiced here, certain transactions or irregularities could be pointed to as suspicious. Of course, this is not suggested as a defense, but merely as a comment on the fact that after the most exhaustive examination of the records and

the internal affairs of Triumph and its subsidiary, Elk Mills, only the insignificant matters mentioned in the Government's brief and hereafter discussed were uncovered, and as to many of these the Court will find that they are criticisms from the vantage point of hindsight.

The Government complains (Gov. Br. 21) that the defendants turned over a million dollar contract of Triumph to Elk Mills, forty-five per cent of whose stock was held by five of the defendants (the petitioner not included), and had thereby caused Elk Mills in six months to make a profit of almost three hundred thousand dollars. It must be remembered that the profits which would be made on this contract were unknown, for this was an entirely new product for the company; and the fact that the venture proved highly profitable is no proof of fraud. Moreover, Triumph itself made a considerable profit, for it owned fifty-five per cent of the stock and in addition, received 10% on the contract, and made a profit on the overhead charges (Pet. Br. 14-15). This case presents a different picture from the ordinary one in which fraud is asserted. The complaint usually is that a particular individual or corporation has been caused to lose money through the workings of a fraud. Here the complaint is not that Triumph lost money, but only that Triumph did not make as much money as it could have if it had performed the contract itself. But if Triumph could not perform this contract because of the limitation against its making the required capital outlay, why wasn't this arrangement, even viewed in retrospect, as good an arrangement as could have been made? The Government did not supply any evidence that Triumph could have sublet the bomb contract upon more favorable terms.

The Government asserts that the manner in which the Elk Mills transaction was treated by Triumph's board of

directors shows they realized the scheme was fraudulent but the evidence contradicts this contention. The fact that the notice of the December 11, 1941, meeting did not expressly mention that the organization of a subsidiary corporation was to be discussed is relied upon as an indication of fraud. Contrary to the Government's statement that the question of a subsidiary corporation was "discussed" as early as December 3, the evidence shows that the first knowledge the petitioner had that the bomb contract had been awarded, or that a subsidiary corporation called Elk Mills had been created, was when he was handed Feldman's memorandum on December 3. The petitioner then acted as any reasonable business man would have, and went to see the corporation's counsel, Mr. Weil. The meeting of December 11 was called to seek a solution to the dilemma in which Triumph was placed. It was not known that the plan evolved would be to utilize Elk Mills as a subsidiary, and it was only after careful discussion that this proposal was approved by a majority of the board of directors, with the corporation's counsel concurring.

Again, contrary to the assertion by the Government (Gov. Br. 22), the Elk Mills contract with Triumph to pay for the overhead furnished by Triumph was openly discussed at the March 17, 1942, meeting and incorporated in the minutes. It is true this took place after MacBride and Shirley had left the meeting, and the resolution introduced by these directors in October (when they were naturally trying to do everything to put themselves in the clear) shows that they left the March meeting before its termination. The prosecution then states that, according to the minutes of the March 17th meeting, the modification of the Elk Mills contract was approved before a report was read by Shirley, and that MacBride recalled having heard the report. From this the Government in-

ferred that the minutes were not a true record. However, this inference is based solely on another inference, namely, that the minutes were a chronological record of the occurrences at the meeting. The record does not show that the minutes were reported in the chronological order of their occurrence at the meeting. Consequently, the inference founded upon another inference must fall. *U. S. v. Ross*, 92 U. S. 281; *Wharton's Criminal Evidence*, Vol. 1, Sec. 64; cf. *U. S. v. Faleone*, 311 U. S. 204, 211.

Besides, all these inferences are advanced in an effort to show that the plan was a secret one, but, as our principal brief points out, the full and detailed disclosure made to the banks, the free access to the minutes afforded the Directors, and the large sign, "Elk Mills Loading Co.", on a door in the main corridor of the Triumph building, clearly show that the plan for the use of Elk Mills was apparent to anyone who would take the trouble to come down to the plant.

The alleged haste in awarding salaries of fifty-two hundred dollars, when stated in this manner, may seem to be ground for suspicion, but when we consider that the general practice of corporations is many times to vote salaries for a year in advance, the shadow is dispelled. Furthermore, there was no evidence whatever that these salaries were unreasonable or excessive. The evidence showed—and the Government refers to the fact (Gov. Br. 21)—that in six months Elk Mills made a profit of \$300,000. Since the contract was to be performed in one year, it can fairly be assumed that a profit of \$600,000 would have resulted. Surely salaries to eight men, who were responsible for such an achievement, aggregating \$41,600, less than one per cent of the company's annual profit, cannot be considered excessive or as an attempt fraudulently to siphon off profits through the declaration of exorbitant salaries.

As to the Government comments on Weil's letter (Gov. Br. 23), it is important to note that it was written sometime after the Elk Mills plan was put into effect and was concerned principally with tax matters. The fact that the attorney sometime later advised against awarding salaries does not make the previous award of such salaries in any way fraudulent. Mr. Weil was concerned with what the attitude of the stockholders might be; it turns out that no stockholder has ever asserted a claim that the use of Elk Mills and the award of salaries was a subterfuge to obtain additional compensation. Even after this prosecution was brought, no stockholder has appeared to charge the petitioner with any fraud in this entire matter. The Government next questions whether the petitioner performed services sufficient to call for his being given a bonus. The prosecution thus is attempting to substitute its ideas as to when a bonus should be declared for those of the men who were in charge of this corporation. These men had enabled their corporation, through a subsidiary, to fulfill a contract for vitally needed bombs in the war effort and the company made a handsome profit. Why were they not entitled to a bonus?

In order to strengthen its argument, hereafter considered, on the use of the mails in furtherance of the alleged fraud, the Government injects into its argument on the lumber deal an additional element unsupported by evidence. The evidence established without contradiction that the five key men defrauded Triumph and secured some twelve thousand dollars as the loot. Further than that the record is silent, and for all that the evidence shows the scheme was complete in and of itself; but the Government theorizes that the loot received by the five key men was to be used by them in paying for the land site for Elk Mills and thus the land would cost them nothing, and thereafter

when they transferred the land for the forty-five per cent stock of Elk Mills they would acquire the stock without paying anything. This is a supposition made without basis in the record and cannot be established on the prosecution's bare assertion.

The petitioner's actions when the lumber scheme became known to him clearly show his innocence (Pet. Br. 16, 33-6). The Government states that the petitioner's contention that he knew nothing about this fraudulent scheme was fairly summarized in the Judge's charge. But the case should never have been submitted to the jury for the evidence was insufficient as a matter of law. The Judge said (R. 227):

"And the Government contends that Mr. Kann did know all about it. The evidence as to that is *general* rather than specific, except insofar as Jackson's personal testimony is concerned * * *." (Italics supplied.)

We thus see that, despite the Government's assertion that the petitioner's contention was fairly summarized, there was no evidence which had any tendency whatever to prove the petitioner's connection with this scheme, other than that of Jackson, which had no probative value (see discussion, Pet. Br. 33-7). Nor were the jury entitled to infer that the petitioner knew that when his nephew referred to the lumber bill he was not talking about outside lumber purchased by Jackson. The record shows without contradiction that the petitioner had nothing to do with construction or the payment of bills. Why would he know that the "lumber bill" did not refer to lumber purchased on the outside by Jackson? Particularly so when the evidence showed that Jackson was making lumber purchases all along. And the mere fact that the beneficiaries of the lumber deal were employees of Triumph in no way

tends to show that the petitioner knew anything about their improper manipulations. Finally, it should be borne in mind, the evidence showed that the petitioner made only periodic visits to the plant and office of Triumph at Elkton, and that he was not in active control of the enterprise, which was under the supervision of Mr. Decker, who resided at Elkton.

This completes the list of points relied on by the Government as amounting to substantial evidence on which the jury could properly find a verdict of guilty. We earnestly submit that the occurrences, considered separately or together, were incapable of furnishing the basis for a finding of guilt. However, when the case was submitted to the jury, in view of the subject matter of the case, (the performance of an incendiary bomb contract for the United States Navy during a period of war) with the heightened feeling toward anyone charged with fraud in connection with the production of munitions, the guilty verdict was likely enough, but completely unjustified.

II.

The evidence was insufficient to show that the Petitioner caused the mails to be used or that the mails were used for the purpose of executing the alleged schemes.

Under the statute, the prosecution was required to establish:

- (A) That the petitioner caused the mails to be used; and
- (B) That the use of the mails was for the purpose of executing the scheme.

Although the Government concedes that it was required to prove both elements, it succeeded in proving neither.

(A) Causing the use of the mails.

Contrary to the assertion in the Government's brief, we have never conceded and do not now concede that the evidence was sufficient to show that the petitioner caused the use of the mails.

Although the trial court correctly charged the jury that the mailing "must reasonably have been foreseen—more than possibly", the problem is not disposed of, for it is necessary to inquire whether there was evidence from which the jury could determine that the petitioner could reasonably have foreseen that the mails would be used.

The determination of a question of causation, such as this, must be governed by the peculiar facts of the particular case. Therefore, the reported cases, while sometimes furnishing valuable analogies, can at best do no more than indicate the correct general principles, leaving the ultimate determination to the court before which a case is presented. Examination of the facts in the present case it is submitted, will establish that the petitioner did not cause the use of the mails within the meaning of the statute.

The evidence shows that Willis' bonus check (third count) was drawn on the local Elkton bank and that he was one of the local consultants employed and evidently residing in Elkton. According to all reasonable probability or foreseeability, this check on the local bank would be cashed or deposited in the local bank on which it was drawn, and no use of the mails would then have taken place. The petitioner cannot be said to have contemplated or reasonably have foreseen that this check would be deposited by Willis in a bank in Newark, Delaware, where he maintained an account, the existence of which the record does not show the petitioner knew.

The trial Judge was hesitant about this point, and expressed himself as follows (R. 204):

"The Court [speaking to the prosecutor] But these checks, of course, at least this second check you are talking about now, is a check of the Elk Mills, and there is nothing to show that it was contemplated that it should be otherwise than delivered to Willis locally and cashed by him locally."

To this comment by the Court the record shows the prosecutor could not supply a satisfactory answer. Nevertheless, the case was submitted to the jury. Let us suppose that the bank, in Newark, which is not many miles distant from Elkton, had used a messenger, as is many times done where the distances are not great (as for instance, with respect to the check set forth in count 1, abandoned for that reason), the mails would never have been used on this check.

The Government seeks to establish a causal connection between, not the actions of Willis and the Newark bank in mailing the check, but between the petitioner and the bank's use of the mails. We submit the causation requisite under the statute must be more direct than that shown by the facts in the instant case. We do not disagree with the principles enunciated in the numerous cases cited by the Government. In most of them, as in the *Kenofskey* case, 243 U. S. 440, the defendant was shown to have unquestioned knowledge that the mails would be used and the scheme itself directly envisioned the use of the mails in its execution. But we submit that the mailings by the banks in the present case were not envisioned or contemplated and at most merely followed an executed scheme.

An authority closely in point is *Spillers v. U. S.*, 47 F. (2d) 892 (5 C. C. A., 1931), where five checks, signed by the de-

fendant and purporting to be profits from machines, were sent by mail to one of the defrauded parties in another state. The checks were deposited in a bank which in turn mailed them to another bank, the latter mailing being the basis of the prosecution. The argument was made that the defendant must be presumed to have known that in the ordinary case the payee would deposit the checks in their city and that the bank receiving the deposit would use the mails in forwarding the checks for clearance. The court rejected this contention, saying:

"There is nothing to show that the appellant knew or had any reason to know, or intended that any of the parties to whom checks were sent would deposit them in banks which would in turn mail them * * * for collection or that he in any way induced the deposits. So far as he was concerned, the scheme was complete when he sent the checks to the purchasers of the machines. It cannot be said * * * that he knowingly caused the letters to be mailed as charged."

Certainly, the mailing by the Newark bank in the instant case of Willis' check was as remote from the petitioner's thoughts as the mailing in the case cited, if not more so. In the *Spillers* case, the defendant himself mailed the checks to the victims, and there was more room for argument that he had put into motion a train of circumstances that would lead to the use of the mail on those checks. In the present case, the petitioner did not himself deposit the check; it was done by Willis, so that it might be said that he was one degree further removed from the causative chain, as compared with the situation in the *Spillers* case. Moreover, in the case cited the checks were sent to another city and the recipients would likely deposit them in a bank of their city, and the bank would then ordinarily mail the checks for collection; in the case at bar, however, the check

was not mailed to a distant city, but was drawn on a local bank and given to the local payee. According to all reasonable probability, therefore, the check in the instant case would be cashed or deposited with the local bank on which it was drawn.

In making this argument we are fully cognizant of the rule, expressly adopted in the *Spillers* case, that a mailing by an innocent agent, which is directly caused by the scheme, is sufficient to come within the statute, but here the chain of causation is entirely too remote, we submit, to enable one to say that the appellant reasonably contemplated or foresaw the use of the mail.

With respect to the use of the mails on the Jackson check to the five key men (second count), the evidence was insufficient to prove the petitioner's participation or even knowledge of the scheme. If he was not a party to this scheme, he could not be said to have caused the mailing of the check.

The trial judge expressed the same thought when he was considering whether to send the case to the jury: (R. 204)

~~"There is one thought that occurred to me about this first check and as to the defendant's responsibility in regard to it. He denies any knowledge of ever having heard of that check or any knowledge of the arrangement whereby these so called key men were paid by this so called lumber account. If he never knew anything of the check and it was not within the purview of his knowledge that such a check would be given, it is difficult to understand how he would be responsible for the mailing of it and collecting it."~~

However, despite the doubts which he so clearly expressed and which were so pertinent, the Judge concluded:

"But, I suppose, that is a matter for the Jury".

It is precisely in this fashion that questions which should have been decided as matters of law, as for instance, the sufficiency of the evidence to show that the mails were used "in execution" were resolved by "supposing that they were matters for the Jury". The Government adopts the same position in this court and seeks to close the door on further careful examination by resorting to the same magic phrase.

Even if Kann's complicity in the lumber deal was properly left for the jury's determination, he did not cause the mails to be used on the Jackson check. It is conceded by the Government that the petitioner had nothing to do with cashing this check, nor did he get any money from it. So far as the evidence shows, the petitioner did not know that Jackson would pay these men by check. The contractor could easily have decided to cash the check given him by Triumph and pay the cash proceeds over to the five men instead of giving them his check in the same amount. Besides, the payees could have cashed the check at the not far distant Wilmington Bank on which it was drawn. Moreover, in view of the short distance between the banks, ~~the Wilmington Bank instead of using the mails to effect~~ collection of the check could have used another means, such as a messenger. It is to be noted that evidently this occurred with respect to the check set forth in count or which was abandoned by the prosecution because the mails were not used in the collection of that check. It is, therefore, entirely reasonable to say that the Wilmington Bank could have used a means for collection other than the mails to clear Jackson's check, just as the Pittsburgh Bank did on the check in the first count.

It may be that where the use of the mails is by a confederate such use need not be so clearly foreseeable as where the use of the mails is by an innocent agency unconnected

with the scheme. In the latter case the decisions seem to require that the evidence show the schemer to have knowledge that the mails would be used. Usually this is clearly proved because the schemer's actions inevitably lead to the use of the mails or the scheme directly contemplated the use of the mails.

Cf. *U. S. v. Kenofskey*, *supra*, *Weiss v. U. S.*, (C. C. A. 5, 1941) 120 F. (2d) 472, *Mitchell v. U. S.*, 126 F. (2d) 550, *Clarke v. U. S.*, 132 F. (2d) 538.

Another pertinent observation is that the Government's cases which are cited in support of the argument on causation consist in the main of cases in which "lulling" letters were sent by the accused and "kiting" cases.

Spivey v. U. S., 109 F. (2d) 181, *Davis v. U. S.*, 125 F. (2d) 144, *U. S. v. Feldman*, 136 F. (2d) 394, *Guardalibini v. U. S.*, 128 F. (2d) 984, *U. S. v. Lowe*, 115 F. (2d) 596.

Little argument is necessary to demonstrate the difference between the use of the mails by a defendant in sending a letter, in contrast to the use of the mails by a bank in mailing a check for its reimbursement. In sending a letter it is clear that the defendant directly causes the use of the mails, but where a bank uses the mails, it is submitted, it must be shown that the defendant on trial foresaw or contemplated that such use would take place in the execution of the scheme. Nor are kiting cases applicable because the basis of the scheme in those cases is the banking practice of mailing checks for clearance, thus giving the accused time to use the credit given him. In such a scheme the use of the mails is directly caused and contemplated by the defendant. By no stretch of the imagination can it be said that the use of the mails in the instant case was conceived of as a part of the alleged scheme.

(B) *Use of the mails in execution of the alleged scheme.*

Counsel for the Government seek to convey the impression that we contend that in all cases where the money is received by the schemers, the fraud is at an end and therefore a use of the mails thereafter cannot violate the statute. We desire to make it clear at the outset, that we do not contend for any such sweeping, inflexible rule. We do contend, however, that where, as in the present case, the payment and receipt of the fruits of the alleged fraud and the element of irretrievable loss to the victim concur, and nothing further remains to be done, the scheme is at an end.

In casting about for some theory on which plausibly to maintain that the scheme here alleged was not at an end when the mails were used by the banks for reimbursement, the prosecution invokes the rule that even where a scheme has ended, if thereafter the accused uses the mails to lull the victim into a state of repose, or to obtain more time to perpetrate additional frauds, or as an aid in avoiding detection, such use violates the statute. The rule is a perfectly valid one and is well supported in the decisions, but it has absolutely no application to the facts of the case now before the Court; and it is necessary to resort to an ingenious torturing of the facts to make the "lulling" rule even appear to be applicable here. In the lulling cases so liberally cited in the Government's brief, *U. S. v. Riedel*, 126 F. (2d) 81, *Preeman v. U. S.*, 244 F. 1, *Davis v. U. S.*, *supra*, *Brady v. U. S.*, 26 F. (2d) 400, (although it is conceivable that a check by itself could be used for that purpose), we usually find the mails used to transmit a letter to the victim in order to quiet his fears and to prevent his taking action that might bring about detection and punishment, and, in some cases, prevent the perpetration of additional frauds.

In the present case no letter was sent to the victim but the banks, for their own purposes, merely used the mails to obtain reimbursement on checks which they had cashed. In the cited cases we have victims who, if not allayed, could and would act to frustrate the plot. Here, however, notice could not get back to the alleged defrauded party, Triumph, for the checks mailed were not its checks. Jackson's check (second count) was given to the five men in return for a check of Triumph, and if his check did not clear the notice would only come back to Jackson who would be required to make good.

With respect to Willis' check (third count), it was issued by Elk Mills, which the Government contends was the device for effectuating the fraud. The defendants were in full control of Elk Mills and would have been the only ones to receive any notice of stoppage. Consequently there was no independent victim capable of frustrating the alleged scheme who was in any way lulled by the mailing of the check. Moreover, a consideration of this point is somewhat unrealistic because since the defendants were in full control of Elk Mills, Willis' bonus check had to clear and therefore knowledge of the fraud could not be obtained.

Under the circumstances of this case, therefore, the use of the mails cannot be said to have been to avoid detection or to gain time in which to make use of the money derived from the fraud.

In the cases involving the kiting of checks, the schemes are directly based on the banking practice of forwarding deposited checks for collection which enables the schemer to obtain credit while the check is in transit. As the Circuit Court of Appeals remarked in *U. S. v. Lowe*, *supra*, at page 598:

"the defendant included in his scheme the use of a banking practice which necessarily required the for-

warding of the deposited check for collection, a practice which would enable the defendant to utilize, at least temporarily, the credit given him by the Chaseburg Bank; and the utilization of this practice was as much a part of the scheme to obtain credit as the drawing and presenting of the worthless check."

These cases have no application to our case for here the alleged fraudulent scheme, according to the Government, was based on the utilization of a subsidiary and did not involve a banking practice as part of the scheme.

We now consider the authorities discussed in the Government's brief and the other points relied upon to show that the mailing of the checks by the banks for reimbursement was in some way in furtherance of the schemes alleged.

The Government contends that the decision in *Stapp v. U. S.*, 120 F. (2d) 898 (C. C. A. 5) rests in part on the finding that the defendant had done nothing to "cause" the mailing. While it is true that the court did mention that the defendant did not cause the use of the mails, this was said at the very end of the case without any discussion but if the opinion is examined, it will be found that the Court concerned itself primarily with the question as to whether the victim was irretrievably defrauded when the mails were used by the bank. The prosecution in our case comments that the defendant in that case did not plan to obtain any further funds from his victim, and that the clearing of the check would have had no effect in aiding the defendant to keep the money since he had already absconded before the mails were used. However, these statements are not found upon a careful reading of the case. They must therefore be regarded as gratuitous additions to the facts.

The Government attempts to distinguish *U. S. v. McKay*, 45 F. Supp. 4004 (E. D. Mich.) from the present case, but

it only succeeds in demonstrating the apposite nature of the cited case. In the *McKay* case we have a close analogy to the situation here. The victim in that case was Ford; here it was Triumph. Bass-Luckoff, Inc., the advertising agency, was the organization to which the victim paid the money and which in turn gave its check to the schemer. In our case Elk Mills was the organization to which the alleged victim, Triumph, gave its money and which in turn issued its check for the bonuses to the defendants. Incidentally, McKay was a responsible official connected with the advertising agency as is shown by his personal contact with Harry Bennett, Ford's personal relations representative. He was not an absconder. The basis of the decision in that case was not that all relationship had ceased between the victim and the schemer for that was not shown or even mentioned in the court's decision; but simply that the scheme was complete since Ford was powerless to retract and the defendant already had the money before the mails were used. Moreover, the facts in the *McKay* case show that two frauds were worked at different times on Ford. From the prosecution's position in this case it does not seem unreasonable to infer that the same considerations were urged there as here, namely, that the mailings were resorted to in order to gain time to perpetrate other frauds and to lull the victim into repose, but it is evident from the opinion that such theories played no part in the decision of the case.

In *Dyhre v. Hudspeth*, 106 F. (2d) 286 (C. C. A. 10), the opinion simply stated that the fraud was complete when the schemer secured the merchandise which he was after and that, therefore, the use of the mails by the banks in thereafter sending the fraudulent checks on for reimbursement occurred after the scheme had been consummated.

In *Steiner v. U. S.*, 134 F. (2d) 931 (C. C. A. 5), the scheme was obviously a continuing one and it was worked again and again in essentially the same manner. The bills or statements were mailed by the defendant to obtain the money and such use of the mails was therefore in furtherance of the continuing scheme. In addition it was proved in that case that the scheme required for its continued success the payment of money to a confederate, the chief clerk at the Tax Assessor's office, for if payments were not made to him, the clerk would not have continued to make the fraudulent tax assessments and the scheme would have died. The statements were sent out, therefore, not only to obtain the fruits of the fraud but also to obtain money so that the confederate could be paid and the scheme kept in operation. It should be noted that the fact that money was to be received by means of the statements and that money would have to be paid to the clerk in order to keep the scheme in operation, were not merely suggested by the prosecution, as is being done here in an effort to establish that the mails were used in execution, but were proved by evidence in the case. We fail to see how the use of the mails by a defendant himself in sending out statements in order to secure the fruits of the fraud has any similarity to the situation in the instant case where the mails were used by the banks on their own account to obtain reimbursement after the money had already been obtained by the defendants.

Similarly, the facts in *Dunham v. U. S.*, 125 F. (2d) 895 (C. C. A. 5) furnish an apt illustration of the use of the mails both in the execution of the scheme and also to lull the victims into repose. It was shown there that the schemer mailed false statements to the victims leading them to believe that all was well and thus inducing new investments. It is indeed difficult to imagine a case in which

the mails were used more directly both in carrying out a scheme and in lulling the victims.

The discussion (Gov. Br. 42) of the *McNear v. U. S.* (60 F. (2d) 861) and *Stewart v. U. S.* (300 F. 769, C. C. A. 8) cases is accurate but we fail to see how the rulings or the facts in them have any tendency to support the Government here.

In the *McNear* case, as in *U. S. v. Dale*, 230 F. 750, the prosecution failed because the fraud was complete before the mails were used. In the *Stewart* case letters were sent to collect the balance of the funds received from the fraud, namely, the money due on the victims' lien notes. Consequently the use of the mails was in execution of the scheme. We also agree with the decision in *Newingham v. U. S.*, 4 F. (2d) 490 (C. C. A. 3) where the mails were used in an attempt to obtain additional monthly payments from the victim. This was proved to be a part of the scheme in that case and the mere fact that the efforts were unsuccessful obviously has no bearing on the schemer's liability under the statute.

Likewise, in *Mitchell v. U. S.*, 118 F. (2d) 653, the Court decided that the scheme was fully consummated when the letters were mailed to the land office for recording. The Government's discussion of the second *Mitchell* case (126 F. (2d) 550), only presents new difficulties for the prosecution in the present case. In the first *Mitchell* case, there was a reversal because a continuing conspiracy had neither been alleged nor proved. In the second case, however, where eight similar and related frauds were perpetrated, a continuing scheme was alleged and proved. The testimony in the case showed that the defendant stated that the recording of the deeds was necessary and that he told the victims that upon return of the deeds from the record

office, they could be sold at a large profit to a company controlled by the defendant. The court said that without the allegation of a continuing scheme and the proof in support, a conviction could not have resulted. It will be noted in our case that the indictment *does not specifically allege a continuing scheme*, and if we disregard the prosecution's conjectures, there was *no proof* in the record that any bonuses were to be issued in the future.

Moreover, as the Court remarked in the second *Mitchell* case, the direction to send the deeds for recording was for the purpose of lulling the victims and to gain time for the defendants to escape apprehension. None of these considerations play any part in the present case.

The prosecution repeatedly points to the Judge's Charge to the Jury as being fair (Gov. Br. 17, 18, 24 fn., 25 fn., 27, 31, 44, 45). But that does not help the Government here for while it is true that where sufficient evidence has been presented to show that the mails have been used in execution, the question is ultimately one for the jury, the Court must first determine as a matter of law whether there is sufficient basis for such finding. Otherwise the question could always be resolved as one for the jury and no reversal could result if it were merely shown that the mails had in fact been used. In the case at bar the evidence was insufficient to support a finding that the mails were used in furtherance of the alleged schemes and that the petitioner caused the mailings. Therefore the submission of the case to the jury, no matter how carefully phrased to safeguard the rights of a defendant, constitutes reversible error.

In our case two separate transactions were shown: the lumber deal and the payment of the bonuses. The evidence furnishes no support for the assertion that the scheme was intended to continue "at least as long as Elk

Mills was performing the contract." Simply because the prosecution has a theory that the defendants intended to continue the alleged scheme beyond the receipt of the particular bonuses shown in the evidence, is not enough, to make the scheme in the instant case a continuing one. It is submitted, the prosecution must point to other instances in which the mails were used and not merely assert that it was intended that there would be other mailings. If by merely asserting that a scheme was a continuing one and that other mailings were contemplated, the scheme in a particular case could be converted into a continuing one, the prosecution in all mail fraud cases could, by *alleging* the scheme in very broad language, avoid the determination of the point so closely considered in the reported decisions, namely, whether the scheme was fully terminated before the mails were used.

The Government states (Gov. Br. 45) that the salaries and bonuses could not have been paid under this scheme unless the payments were made in normal fashion by Elk Mills' checks. According to the Government, the defendants completely dominated and controlled Elk Mills. Why then was it necessary that the payments be made in normal fashion by Elk Mills' checks? Triumph, the defrauded party, could not learn of the fraud if the checks were not paid because the knowledge of non-payment could only come to Elk Mills which had issued the checks but which was under the defendants' control. Therefore, despite the Government's suggestion (Gov. Br. 45), it is difficult to see how any individuals interested in Triumph's finances could have discovered the plot whether the bonus check did or did not clear.

The Government states (Gov. Br. 46) that the bonus checks were only part of a "continuing process" of draining

off Triumph's funds. But this is only a theory, for no bonus checks were introduced in evidence other than the one issue, dated May 27, 1942, nor was there any evidence that further bonuses would be issued.

Next, the Government compares the present case to the *Decker* case, 140 F. (2d) 378, but there is no similarity whatever between them since the evidence in the cited case clearly showed the continuing nature of the scheme there and the exact similarity in the mailings. The prosecution does concede, however, that the checks in the instant case were not of a similar nature (Gov. Br. 46) and this is significant because where (in the absence of evidence directly establishing the continuing nature of a scheme) the courts have found a continuing scheme present, the similarity in the mode of executing the related frauds and the similarity in the mailings is invariably pointed to as an indication that the scheme was of a continuing nature. See *U. S. v. Lowe*, *supra*; *Hastings v. Hudspeth*, 126 F. (2d) 194 (C. C. A. 10).

Contrary to the Government's statements (Gov. Br. 46) that salaries were drawn after the bonus checks were paid, the record shows that the bonus payments were made on May 27, 1942, and the statement of withdrawals on page 128 of the Records is a schedule up to July 31, 1942, and it was not shown in the evidence that any salaries were paid after the bonuses.

We next consider the lumber transaction. The prosecution contends (Gov. Br. 47) that it was part of the scheme for the five payees of Jackson's check (the key men) to acquire their Elk Mills stock by using the fruits of the lumber fraud. The evidence, however, does not support this linking of the lumber deal with the acquisition of the stock, but merely shows that the five men worked a

fraud on Triumph and obtained and divided the money. The Government's *assertion* that they intended to use the money obtained from the lumber deal in paying for the stock is injected into the case to meet the difficulties in the way of showing that the use of the mails on Jackson's check was in execution of the scheme. For if the scheme was, as the evidence showed, simply a plot to defraud Triumph of money, when Triumph issued its check and the men cashed it and received the money, the matter would be at an end. But if the prosecution's assertion is added, it could be argued that the scheme was not complete until these men paid for the land and in turn transferred it and received the Elk Mills stock. We insist that since there was no proof as to whether the men intended to use the lumber money to purchase the land and thus receive the stock without paying for it, the prosecution cannot extend the scheme shown in this case by its own assertions.

The evidence furnishes no basis for a finding of the petitioner's complicity in this scheme. If the single question and answer (R. 66) on which the Government must rely is fairly read, it becomes apparent that the petitioner answered that he did not see why the bill should not be paid, in a completely offhand manner, while walking down the corridor. The payment of bills and construction matters, it was shown indisputably, were not part of his duties and his answer indicates that he was mildly surprised that the question was asked.

The Government contends (Gov. Br. 47-8) that it was necessary for the Jackson check to clear in order that the payees could keep the money. In support of that contention, it is said that these men were not absconders and lived in the vicinity of Elkton and would have had to make the check good if it had not been paid. As to this, there was no showing in the evidence that the five men would or

would not abscond. Besides, the determination of amenability to punishment under the Mail Fraud Statute does not rest on whether the schemers are absconders or not.*

The theory urged by the Government has no validity, and does not enter into the determination of whether the scheme is at an end. The true test established by the many decisions on the subject is (1) whether the victim has suffered an irretrievable loss and (2) whether the schemers have received the money before the mails are used. If both these elements concur and nothing remains to be done, as in the present case, the scheme is at an end. Further, the absconding theory in its application would be beset with perplexing difficulties. If, for instance, a schemer after fully executing his scheme had absconded but could be located, could he then be prosecuted upon the theory that, in view of his apprehension, the scheme was not complete because he might be made to reimburse the victim? It seems also that consideration would have to be given to whether the schemer in a particular case had the money with which to make reimbursement. None of these matters were inquired into in the case now before the Court, and, aside from this, it is submitted that the theory is not a true guide for determining the completion of the scheme.

Again, on page 48 of its brief, we find the Government repeating its *theory, unsupported in the evidence*, that the stock was to be paid for from the fruits of the fraudulent lumber deal. It seems that the Government is desperately trying to effect by the mere force of reiteration

* Here, it is to be noted, the Government relies on its "absconding" argument but later it discards that theory and says that it is not the true test of the law. As another observation, the numerous cases on the subject do not rely on any theory of the schemer being an absconder. For instance, in the *McKam* case, where the prosecution failed, the schemer was a responsible official of an advertising agency who was not shown to be contemplating flight immediately after the successful completion of his fraud.

an enlargement of the scheme and to link by mere theorization, the payment of the Jackson check to the eventual acquisition of the Elk Mills stock as an additional step in the scheme.

The comparison attempted to be drawn (Gov. Br. 48) between this case and the *Kenofskey* case, 243 U. S. 400, is clearly inappropriate. In that case the mails were directly used in the execution of the scheme because the mails were the means by which the fraud was to be effected and the schemer calculated that the mails would be used as they had to be for the scheme to succeed. In our case, however, the Government is attempting to establish by conjecture that a scheme which on its face was complete in and of itself included some additional step not shown in the evidence.

The reference (Gov. Br. 48) to the case of *Bogy v. U. S.*, 96 F. (2d) 734 (C. C. A. 6), does not furnish any support to the Government. In that case the release of the defendant from liability was the principal object and, without this element, Bogy's scheme would have been meaningless. But the issuance of Jackson's check in the lumber deal was complete in and of itself and so was the issuance of the one bonus. Moreover, the letters sent by the defendant in the cited case to his victims were intended to lull them into a sense of false security and thus postpone their acting and therefore the mailings helped to delay discovery of the fraud. The Government's insistence (Gov. Br. 49), that until the defendants in this case not only had the money but were certain their possession would not be questioned they could not and did not use the money to pay for the land, finds no support in the evidence and, we repeat, it is simply an assertion put forward to meet the difficulties that stand in the way of showing that the

mails were used for the purpose of executing the scheme alleged.

In the concluding portion of its argument on furtherance, the Government casts aside the absconding argument and maintains that the cashing of a check by a defrauder on an out of town bank "sets in motion the train of circumstances which necessarily causes the use of the mails," and therefore the mailing following that act is in execution of the scheme. The argument is made that the cashing of the check and its mailing are inseparable, and if it be conceded that the cashing is in furtherance, the mailing is, too. The fallacy in that argument is that the two acts—the cashing and the mailing—are not inseparable. In the present case the first act, the cashing of the check, was in furtherance, because it was the means by which the alleged schemers obtained the fruits of their alleged fraud; but the second act, the mailing by the banks which cashed the checks in order to obtain reimbursement, a distinct action resorted to not by the defendants but by the banks, was done for the banks' purposes and, therefore, not in furtherance of the fraud.

The Government's contention (Gov. Br. 43-53), seems to be that if the use of the mails is brought about by the deliberate act of the defendant the statute is violated. If this rule were adopted it would necessarily result in a most extreme extension of the Mail Fraud Statute and would result in bringing practically all cases of fraud within the federal jurisdiction, contrary to the intention of Congress. That view is unsupported in the decisions and it would nullify the vitally important language in the statute that the mere use of the mails is not sufficient, but that such use must be *for the purpose of executing the scheme* before the statute is violated. The theory urged upon the

Court disregards this limiting language and converts the statute into one authorizing prosecution where only a use of the mails is shown. We feel confident, however, that the Court will not adopt this interpretation, for it would run counter to the explicitly declared intention of the Congress.

The Government states that this view, which in essence reduces the question solely to whether a schemer caused the use of the mails, is the rationale of the decisions in *Hart v. U. S.*, 112 F. (2d) 128 (C. C. A. 5) and *Tincher v. U. S.*, 111 F. (2d) 18 (C. C. A. 4).

However, when these cases are examined it is found that in the *Hart* case the court never expressed any theory of the nature now urged by the Government, and the lengthy discussion by the court in that case as to whether the victim had been irrevocably defrauded at the time the mails were used shows that the court judged that, under the facts of that case, the victim was not defrauded until the check had cleared. In the *Tincher* case, as our principal brief shows, the court expressly found that the mailings were in furtherance because they were the means by which the money was received. Neither of these courts expressed itself in such a way as to justify the Government in stating that the rationale of these cases is in harmony with the theory now advanced. The basic defect in the Government's theory is that the proof of causing the mailing, no matter how clear, is not sufficient to supply the other essential element, namely, that the mails must be used for the purpose of executing the scheme.

As previously shown, contrary to the Government's treatment (Gov. Br. 51), the *Stapp* case was decided principally on the ground that the mails were not used in the execution of that scheme and it is a persuasive authority

in the case now before the Court; while the Government's attempts (Gov. Br. 51) to distinguish *Dyhre v. Hudspeth*, *supra*, merely strengthens our argument, previously made, that the petitioner did not cause the mails to be used.

Although previously the prosecution interpreted the *McKay* case, 45 F. Supp. 1001, as in harmony with its contentions, it seems to have changed its mind about this case in the last part of its brief and contends that the case was erroneously decided (Gov. Br. 51-52), because it is said, the court failed "to realize that the scheme was not complete until the defrauder had obtained his spoils." However, this is not a valid objection because in that case the evidence showed that not only was the victim defrauded beyond recall, but that the schemer obtained the spoils when the checks were cashed.

The remaining comments concerning the rule that should be followed where the schemers do not abscond have previously been considered (*supra*, 29-30). This theory does not take into account the fact that the law is concerned with determining when the victim has been irretrievably defrauded, and if, with that element, it is also established that the schemer has received the loot and nothing more remains to be done, the subsequent use of the mails by the banks for reimbursement cannot be regarded as in furtherance of the scheme.

At all events, it is certain that when the banks cashed the checks in the instant case, Triumph, the alleged victim, was defrauded beyond recall and whether, thereafter, there was a chance for recovery of any of the money is subject to too many uncertainties to provide a satisfactory test under the statute.

CONCLUSION.

The case should not have been submitted to the jury because there was not sufficient evidence on which the jury could find that a fraudulent scheme or schemes existed and that the petitioner was a party thereto.

The Government likewise failed to establish that the use of the mails was for the purpose of executing the alleged schemes. The petitioner did not "cause" the use of the mails on the checks which were shown in evidence to have been mailed by the banks for reimbursement. His connection with such use of the mails was too remote to establish causation under the statute. As to the use of the mails in the execution of the alleged schemes, the evidence showed the schemes were complete when the checks were cashed, and the Government failed to establish that the banks' use of the mails thereafter on their own account for reimbursement had anything to do with the success of the schemes or had any tendency to help in their execution, hence the mails were not used in furtherance. The prosecution merely proved that the mails were used without showing that such use was for the purpose of executing the alleged fraudulent schemes.

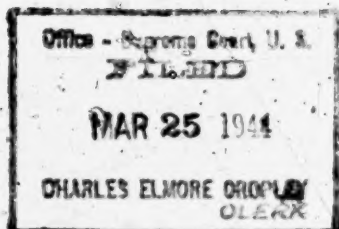
It is respectfully submitted the judgment should be reversed.

SIMON E. SOBELOFF,

BERNARD M. GOLDSTEIN,

Attorneys for Petitioner.

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No. **159** 35

In the Supreme Court of the United States

OCTOBER TERM, 1943

GUSTAV H. KANN, PETITIONER

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 759

GUSTAV H. KANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 214-218) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 4, 1944 (R. 218-219). The petition for a writ of certiorari was filed on March 4, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in connection with a scheme to defraud a corporation and its stockholders by diverting profits through a subsidiary company to the defendants in the form of salaries, bonuses, etc., the use of the mails in the collection of checks representing part of the diverted profits constitutes use of the mails in execution of the scheme.

2. Whether the evidence is sufficient to sustain petitioner's conviction.

STATUTE INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause

to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than \$1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner and others were indicted, in the District Court of the United States for the District of Maryland, in three counts charging use of the mails in execution of a scheme to defraud. In substance, the scheme charged was one to divert from Triumph Explosives, Inc., and its stockholders a large part of the profits earned and to be earned by Triumph, by creating a corporation known as the Elk Mills Loading Corporation, subletting to it Triumph's contract with the Government for the manufacture of incendiary bombs, and distributing a large part of the diverted profits to the defendants in the form of salaries, dividends, bonuses, etc.¹ Petitioner was president and a director of Triumph; his codefendant, Decker, was vice president and a director; and the other defendants were employees of Triumph (R. 188, 191-192). Petitioner's codefend-

¹The indictment does not appear in the record, but appears at pp. 5-15 of the stenographic transcript of record certified and filed with the Clerk pursuant to stipulation of the parties (see R. 219-220).

ants pleaded *nolo contendere* (Pet. 4).² Petitioner was tried alone, convicted on the second and third counts, and sentenced to imprisonment for three years and to pay a fine of \$2,000 (R. 127). On appeal to the Circuit Court of Appeals for the Fourth Circuit, his conviction was affirmed (R. 214-218).

The evidence for the Government may be summarized as follows:

Triumph Explosives, Inc., whose stock was widely held by the public (R. 132), obtained a contract on November 27, 1941, for the manufacture of incendiary bombs (R. 1). On December 2, 1941, at the request of William L. Kann, Jr., petitioner's nephew, Triumph's attorney organized a corporation known as the Elk Mills Loading Corporation (R. 59-60, 206). Petitioner and some of the other defendants discussed a plan whereby the bomb contract would be sublet to the Elk Mills Corporation, which it was contemplated would be a wholly independent company with stock owned by petitioner, Decker, and five of the employee defendants. William Kann, Jr., was not to be a stockholder (R. 67-68, 85). That plan was disapproved by petitioner's brother-in-law, Weil, an attorney, who informed petitioner that in his opinion directors of Triumph could not legally own stock in a corporation which expected

² The defendant, Decker, under the present indictment, is the petitioner in *Decker v. United States*, No. 729, this Term, which, however, involves a wholly separate indictment.

to obtain a subcontract from Triumph (R. 64, 67-68). At a special meeting on December 11, 1941, the directors of Triumph, among whom were petitioner and Decker, approved a plan whereby 45 percent of the stock of Elk Mills was to be issued to five employees of Triumph, including William Kann, Jr., who were personally to acquire and deed to Elk Mills a site for the erection of a plant. Fifty-five percent of the stock was to be issued to Triumph in consideration of Triumph's subletting to Elk Mills the incendiary bomb contract and transferring to Elk Mills advance payments to be obtained from the Government (R. 1-5). The reasons given by the minutes of that meeting for the proposed arrangement were that under Triumph's loan agreement with the Peoples Pittsburgh Trust Company and the Federal Reserve Bank of Cleveland, Triumph could not make the capital expenditures required to fulfill the contract, and that the five employees to whom the 45 percent of the stock of Elk Mills was to be issued were key men and were threatening to leave because of dissatisfaction with their compensation from Triumph, which could not be increased without the consent of the banks (R. 1-5). The Elk Mills arrangement was, however, to be subject to the approval of the banks (R. 5); and after some discussion the banks took the position that it was not in violation of their loan agreement with Triumph (R. 42). The stock of Elk Mills was issued in accordance with the approved arrangement, and officers and directors

of Elk Mills were elected (R. 30, 85, 161-163, 166-168). Petitioner, his nephew, and Decker constituted a majority of the board of directors (R. 166).

At another special meeting on March 17, 1942, the directors of Triumph approved a modification of the subcontract with Elk Mills whereby Triumph would furnish to Elk Mills Triumph's own employees, would provide light, heat, and other services, and would receive as compensation five cents per bomb produced (R. 5-7). Although the minutes of that meeting record five directors as present (R. 5), two of those allegedly present heard no discussion of the Elk Mills transaction and did not know of the existence of Elk Mills until October 1, 1942 (R. 132, 135-136, 139-140, 164). Another director, who was not present at the meeting, likewise was not informed of the existence of Elk Mills until October 1, 1942 (R. 142-143). Under Triumph's bylaws, the three directors (two of whom were petitioner and Decker) who admittedly were present and approved the modification of the subcontract did not constitute a quorum (R. 158-159). Moreover, the notices of the special meetings of December 11, 1941, and March 17, 1942, contained no reference to the Elk Mills transactions as the subject matter of the meetings despite the fact that, under Triumph's bylaws, such notice of the subject matter to be dealt with was required (R. 158-160).

Although the plan approved by Triumph's directors called for the acquisition of the building site by the five additional owners of Elk Mills stock (*supra*, p. 5), Triumph bought and paid for the property and took the deed in its name (R. 61-62, 146-149, 155, 157-158). The arrangements for the acquisition of the property were made by Decker (R. 146). A deed to the property from Triumph to Elk Mills was never recorded (R. 148-149, 157). Nevertheless, the individual owners of the Elk Mills stock directed the contractor who was erecting the building on the site to use timber taken therefrom, and billed him for \$12,000 worth of timber. The contractor in turn billed Triumph for that amount and, after receiving payment, gave a check for the same amount to the individual stockholders of Elk Mills (R. 8-17, 152-157). The cost of cutting the timber was also paid by Triumph (R. 181). Petitioner approved the payment of the lumber bill to the contractor by Triumph (R. 17-20, 24). The check, dated July 22, 1942, given by the contractor to the individual Elk Mills stockholders, was cashed by the payees at the Peoples Bank of Elkton, Maryland, and was deposited by that bank in the United States mails to be delivered to the Wilmington bank on which it was drawn (R. 7). This check was the basis of the second count of the indictment (R. 116).

On January 2, 1942, at the organization meeting of Elk Mills, a salary of \$5,200 per annum was

voted to each of the defendants named in the indictment (R. 166-169). This action, at a time when the corporation had no assets and had not actively commenced operations, was severely criticized by Weil, petitioner's brother-in-law, who wrote petitioner that the fixing of nominal salaries for petitioner and Decker would protect them from possible charges by stockholders of Triumph that the formation of the subsidiary was a subterfuge to obtain additional compensation (R. 196-201). On March 17, 1942, the directors of Elk Mills voted to each of the defendants a bonus of \$5,000, in recognition of their work in eliminating delays in production (R. 169-171); \$40,000 was advanced by Triumph on the subcontract to cover such payments (R. 89, 172-173). Petitioner's activities for Elk Mills, according to his own testimony, consisted of administrative matters and attempts to put Elk Mills on its own credit standing (R. 96). The bonuses and a substantial part of the salaries were paid to the defendants (R. 79, 171, 181). The bonus check to the defendant Willis was deposited in his bank at Newark, Delaware, and was mailed by that bank to the Peoples Bank of Elkton, Maryland, on which it was drawn (R. 8). It formed the basis of the third count of the indictment (R. 118).

Elk Mills, from the time of its inception to July 31, 1942, received \$600,000 from Triumph on the incendiary bomb contract. The net profit of Elk Mills as of July 31, 1942, after salaries and

bonuses had been paid but before taxes were deducted, was in excess of \$200,000 (R. 53, 181). In August 1942, the Navy Price Adjustment Board commenced an investigation of Triumph and its subsidiaries (R. 176). It uncovered the lumber deal (*supra*, p. 7) and questioned petitioner and others concerning it. Petitioner denied knowledge of it, but stated that all interested parties would be willing to undo what had been done (R. 180; see R. 94, 163). When the Navy Department investigator questioned the necessity for the organization of Elk Mills in order to satisfy "key" employees, Weil, in the presence of petitioner and Decker, admitted that petitioner, Decker, Willis, and Kann, Jr., would not have left Triumph and that only three employees were threatening to resign (R. 179). After the Navy Department investigation, the five individual stockholders of Elk Mills transferred their stock to Triumph (R. 137, 174, 187) and the Navy Department took over the operation of Triumph's plant in October 1942 (R. 137, 186).

ARGUMENT

I

Contrary to petitioner's contention (Pet. 18-34), the decision below presents no conflict with decisions of other circuits on the issue of whether the mailing of the checks was in execution of the scheme to defraud. The courts are agreed that if the mails are used as part of a continuing

fraudulent scheme; the mailing is within the interdiction of the statute. Cf. *United States v. Kenofsky*, 243 U. S. 440, 443; *Bradford v. United States*, 129 F. (2d) 274, 276 (C. C. A. 5), certiorari denied, 317 U. S. 683; *Hastings v. Hudspeth*, 126 F. (2d) 194, 196 (C. C. A. 10), certiorari denied, 316 U. S. 692; *Weiss v. United States*, 120 F. (2d) 472, 475 (C. C. A. 5), certiorari denied, 314 U. S. 687; *Bogy v. United States*, 96 F. (2d) 734, 740 (C. C. A. 6), certiorari denied, 305 U. S. 608; *Brady v. United States*, 26 F. (2d) 400, 401 (C. C. A. 9), certiorari denied, 278 U. S. 621; *Tincher v. United States*, 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Newingham v. United States*, 4 F. (2d) 490, 492 (C. C. A. 3), certiorari denied, 268 U. S. 703. The Fifth and Tenth Circuits, upon whose decisions petitioner relies (Pet. 25-26), have so held in recent cases. *Steiner v. United States*, 134 F. (2d) 931, 934 (C. C. A. 5), certiorari denied, 319 U. S. 774; *Mitchell v. United States*, 126 F. (2d) 550, 554 (C. C. A. 10).³

Here the scheme charged in the indictment was not merely to obtain \$12,000 by the lumber transaction and \$40,000 in bonuses. It was a scheme

³ The question is discussed, and the authorities cited by petitioner are distinguished, at pages 6-12 of the Brief in Opposition to the petition for certiorari in *Decker v. United States*, No. 729, this Term. The decision in the *Decker* case was relied upon by the court below in the instant decision (R. 218; see Pet. 49).

to divert the profits of Triumph to the defendants through Elk Mills by salaries, dividends, bonuses, and otherwise. That scheme was clearly intended to continue at least as long as Elk Mills was performing the incendiary bomb contract. It did in fact continue until terminated in October 1942, following the Navy Department investigation. Hence, it is unimportant to determine at what precise moment Triumph was defrauded of the particular part of its profits represented by the checks which formed the basis of the indictment.⁴

The mailing of the checks was merely a part of the general scheme which was intended to, and did, continue after the checks were paid by the banks on which they were drawn. Obviously the clearing of these checks, as also the clearing of subsequent checks that it was contemplated would be issued, was not only in furtherance of, but was essential to the effectuation of, the scheme to defraud.⁵

⁴ For this reason we make no distinction between the check which was cashed (*supra*, p. 7) and the check which was deposited in the payee's account (*supra*, p. 8). In order to sustain petitioner's fine in the amount that it exceeds \$1,000, both counts on which petitioner was convicted must be sustained.

⁵ The court charged the jury with care and particularity that it must not merely find the existence of a fraudulent scheme and the use of the mails, but that it must be satisfied "beyond a reasonable doubt that the use of the mails was in connection with and in furtherance or in execution, as we say, of the scheme itself" (R. 113). Since the question

II

Petitioner's contention that the evidence is insufficient to support his conviction (Pet. 18, 34-44) is likewise without merit. The court below was clearly correct in holding that the composite picture presented by all the facts is one of fraud (R. 216). Petitioner argues (Pet. 34-37) that the directors of Triumph were justified in believing that the banks would not authorize increased capital expenditures by Triumph itself and that the organization of Elk Mills was therefore a necessary business arrangement. However, the banks did consent to the Elk Mills arrangement (*supra*, p. 5) and did, in March 1942, authorize additional capital expenditures by Triumph (R. 186). The jury was therefore warranted in believing that the handicaps of the loan agreement were more technical than real. Moreover, even assuming that the organization of a subsidiary corporation to perform the incendiary bomb contract was desirable, the manner in which Elk Mills was organized indicates an attempt to use that device, not for legitimate purposes, but as a means of obtaining unjustified personal profits. In this connection, it is significant that the original plan

whether a particular use of the mails was "for the purpose of executing" the fraudulent scheme is one of fact, we submit that this issue is foreclosed by the verdict of the jury, rendered, as it was, upon proper instructions.

called for the issuance of one-seventh of the stock to petitioner and Decker; that, when that plan was dropped, 5 percent of the stock was issued to petitioner's nephew, who was not originally contemplated as a stockholder; that the formation of Elk Mills was not disclosed to the other directors of Triumph; that the contract of March 17, 1942, was approved by less than a quorum of the board of directors; that petitioner, his nephew, and Decker constituted a majority of the directors of Elk Mills and were in a position to dictate its policy (R. 166); that the directors of Elk Mills were unwilling to wait until the corporation was in active operation to approve substantial salaries to the officers and employees; and that petitioner's own account of his services for Elk Mills shows no basis for the payment to him of a \$5,000 bonus (see Statement, *supra*, pp. 4-8). Petitioner denied knowledge only of the lumber deal (R. 80, 92-94, see Pet. 43-44). Wholly apart from the contractor's testimony that petitioner approved the payment by Triumph (*supra*, p. 7), petitioner's connection with the whole scheme was so intimate that the jury was clearly justified in inferring that he was aware of that arrangement.

The district court and the circuit court of appeals have found that the verdict is based upon substantial evidence, and we submit that there is

no need of further review, the evidence by this Court. *United States v. Johnson*, 319 U. S. 503, 518; *Delaney v. United States*, 263 U. S. 586, 589-590.

CONCLUSION

The decision below is correct. The case presents no conflict of decisions and no question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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Attorney.

MARCH 1944.

No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1944

GUSTAV H. KANN, PETITIONER

v.

UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 35

GUSTAV H. KANN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 232-237) is reported at 140 F. (2d) 380.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 4, 1944 (R. 237). The petition for a writ of certiorari was filed on March 4, 1944, and was granted on April 10, 1944 (R. 238). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the evidence was sufficient to establish (a) a scheme to defraud and petitioner's participation therein, and (b) use of the mails for the purpose of executing such scheme.

STATUTE INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

* Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular,

pamphlet, or advertisement, shall be fined not more than \$1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner and six others were indicted in the United States District Court for Maryland in three counts charging use of the mails in execution of a scheme to defraud, in violation of Section 215 of the Criminal Code (18 U. S. C. 338). The indictment charged, in essence, that the defendants, all of whom were officers and employees of Triumph Explosives, Inc., and two of whom, petitioner and Decker, were directors, devised a scheme to defraud Triumph and its stockholders of a large part of its profits by creating a corporation known as the Elk Mills Loading Corporation, subletting to it Triumph's contracts with the Government for the manufacture of ordnance supplies, and distributing a large part of the diverted profits to the defendants in the form of salaries, dividends, bonuses, and the like (R. 1-11).

Petitioner's codefendants pleaded *nolo contendere* (R. 13). Petitioner was tried alone, was convicted on the second and third counts,¹ and was sentenced to imprisonment for three years and payment of a \$2,000 fine (R. 11). On appeal to the Circuit Court of Appeals for the Fourth Circuit, his conviction was affirmed (R. 237).

¹ The first count was abandoned by the Government at the trial (R. 38).

The evidence may be summarized as follows:

Triumph Explosives, Inc., was a Maryland corporation whose stock was widely held by the public (R. 20). Petitioner was its president and director; his codefendant Decker was vice-president and director;² and the other five defendants (Feldman, Prial, Willis, Deibert, and William L. Kann, Jr.) were administrative and executive employees of Triumph (R. 14-15, 19, 84, 191). In the fall of 1941, Triumph was engaged in producing ordnance supplies for the Army and Navy (R. 184). On November 27, 1941, it was awarded a large contract with the Chemical Warfare Service of the War Department for the production of incendiary bombs (R. 14). Performance of this contract would have necessitated capital expenditures on the part of the company, including acquisition of additional land, erection of buildings, and purchase of machinery and equipment (R. 14).

On December 2, 1941, at the request of William L. Kann, Jr., petitioner's nephew, Triumph's attorney organized a corporation known as the Elk Mills Loading Corporation (R. 140-141, 144). Petitioner testified that on December 3, 1941, he received a memorandum from Feldman, one of the employee defendants, suggesting a plan for the

² The other directors were William L. Kann, petitioner's brother; L. A. Diamondstone, petitioner's brother-in-law; R. V. Criswell; Van Dyk MacBride; and Colonel A. P. Shirley (R. 19, 35, 191).

organization of Elk Mills as an independent corporation to carry out the incendiary bomb contract, the stock to be owned by petitioner, Decker, and five "key" employees (R. 165-166; see R. 147-148). That plan was disapproved, however, by petitioner's brother-in-law, Weil, a lawyer, who informed petitioner that in his opinion Triumph's directors could not legally own stock in a corporation which expected to obtain a subcontract from Triumph (R. 149).

At a special meeting of Triumph's board of directors on December 11, 1941, a majority of the board—petitioner, Decker, William L. Kann (petitioner's brother) and Criswell—approved a new plan under which 45 percent of the stock of Elk Mills was to be issued to the five employee defendants, who were personally to acquire and deed to Elk Mills a suitable site for the erection of a plant. Fifty-five percent of the stock of Elk Mills was to be issued to Triumph in consideration of its subletting the incendiary bomb contract and transferring to Elk Mills advance payments to be received from the Government. The reasons for the proposed arrangement, as set forth in the minutes of the meeting, were that, under Triumph's loan agreement with the Peoples Pittsburgh Trust Company and the Federal Reserve Bank of Cleveland, Triumph was not authorized to make the capital expenditures required to fulfill the contract, and, furthermore,

that the five employees to whom the 45 percent of the Elk Mills stock was to be issued were threatening to leave because of dissatisfaction with their compensation from Triumph, which could not be increased without the consent of the banks: (R. 13-17.) The Elk Mills arrangement was made subject to the approval of the banks (R. 16), which subsequently took the position that the plan was not in violation of their loan agreement (R. 104, 108). The banks were never requested to authorize Triumph either itself to make the capital expenditures required under the contract, or to increase the salaries of the allegedly dissatisfied employees (R. 113-114, 160). The loan agreement between the Peoples Trust Company and Triumph provided for the bank's approval of increases of salaries over \$3,000 per year and for a limitation of capital expenditures to \$300,000, most of which had already been expended prior to the award of the incendiary bomb contract (R. 99-100, 112). However, the bank customarily authorized increases in salary requested by Triumph (R. 98-99), and prior and subsequent to the organization of Elk Mills, it authorized increases in salaries for some of the "key" employees (R. 121-122). A few months subsequent to the organization of Elk Mills, prior to March 17, 1942, the bank approved a payment by Triumph of substantial bonuses to some of these employees (R. 124), and shortly thereafter permitted the payment of bonuses in a sum not

exceeding \$30,000 (R. 125). Moreover, between March and December 1941 the bank had increased the amount of Triumph's authorized capital expenditures from \$160,000 to \$300,000 (R. 99, 116-117), and in May 1942 increased the authorized amount to \$650,000 (R. 119).

The stock of Elk Mills was issued in accordance with the approved arrangement, and officers and directors of Elk Mills were elected. Petitioner, his nephew, and Decker constituted a majority of Elk Mills's board of directors (R. 78-79). At another special meeting of Triumph's board of directors on March 17, 1942, the subcontract to Elk Mills was modified to provide that Triumph would furnish its employees to Elk Mills and would also provide light, heat, and other services necessary for the performance of the bomb contract, receiving as compensation five cents for each bomb produced (R. 17-19). The minutes of the meeting record five directors as present (R. 17). Two directors, who were present during most of the meeting, heard no discussion of the Elk Mills transaction and did not become aware of the existence of Elk Mills until October 1, 1942 (R. 20-21, 23-24, 27, 32, 33). Another director, who was absent from the meeting, was not informed of Elk Mills's existence until October 1, 1942 (R. 35). Under Triumph's bylaws, the three remaining directors (two of whom were petitioner and Decker) present at the March 17 meeting did not constitute a quorum (R. 72). Moreover, the

notices of the special meetings of December 11, 1941, when the Elk Mills arrangement was approved, and of March 17, 1942, when the contract was modified, contained no reference whatsoever to Elk Mills (R. 73-74) even though Triumph's bylaws required that notice be given of the business to be transacted at special meetings (R. 72).

On January 2, 1942, at the organization meeting of Elk Mills, a salary of \$5,200 annually was voted to each of the defendants either as officers or consultants of the Company (R. 79-81). This action, taken when the corporation had no assets and was engaged in no active business of any kind, was criticized by petitioner's brother-in-law, Weil, who, in a letter to petitioner dated February 11, 1942, suggested that the fixing of merely nominal salaries for petitioner and Decker might save them from possible accusations that the formation of a subsidiary was only a device to provide them with additional compensation (R. 132-137). Nevertheless, the salaries were not rescinded (R. 128); instead, on May 27, 1942, less than six months after the organization of Elk Mills, and at a time when no substantial payment had been made on the purchase price of the Elk Mills site (see *infra*, pp. 9-10), the directors of Elk Mills voted a bonus of \$5,000 to each of the defendants and Criswell, allegedly in recognition of their work in eliminating delays in production (R. 82-83). Elk Mills then had \$1313.12 in its bank account (R.

87). Triumph advanced \$40,000 on the subcontract to Elk Mills, and a few days thereafter the \$40,000 was paid to the defendants and Criswell in the form of bonus checks (R. 85-87). The check of the defendant Willis was deposited in his bank at Newark, Delaware, and was mailed by that bank to the Peoples Bank at Elkton, Maryland, on which it was drawn (R. 37-38). The mailing of this check forms the basis of the third count of the indictment (R. 9-10A).

The plan approved by Triumph's directors on December 11, 1941, called for the acquisition of a building site by the employee defendants, and the conveyance of such site to Elk Mills as consideration for the issuance to them of 45 percent of the Elk Mills stock (R. 17); and the minutes of the January 2, 1942, organization meeting of Elk Mills record the acceptance of an offer by these persons to sell a tract of land to Elk Mills in consideration of the issuance to them of 3150 shares of the common stock of Elk Mills (R. 81). In fact, however, the negotiations for the purchase of the property were made by Decker who had for years been trying to acquire this particular site (R. 39-40). On December 29, 1941, Triumph made a down payment of \$250 on the property (R. 39); and on March 11, 1942, Triumph paid \$500 to the broker as commission for arranging the purchase of the land (R. 40). A deed to Triumph was executed by the vendors on June 18, 1942, but some diffi-

culty developed in the title with the result that the balance of the purchase price, \$10,980, was not paid until October 1, 1942 (R. 41-42, 67). When title to the property was about to be cleared, Forrestell, Triumph's attorney, obtained checks for their share of the purchase price from the individual owners of the Elk Mills stock but was directed by Sabel, Triumph's auditor, to use Triumph's check to pay for the land, apparently for the reason that the entire Elk Mills transaction had been discovered by Commander Seidman, a Navy Department auditor, and consequently was about to be rescinded (R. 193, 196-198; see R. 75-76, 77-78). A deed to the property from Triumph to Elk Mills, dated October 1, 1942, was never recorded (R. 42, 67).

About February 1, 1942, after the contract for the sale of the land had been signed by Triumph but before any effort to take title had been made, several of the individual owners of Elk Mills stock directed the contractor who was erecting a building on the site to use timber taken from the land in the construction of the building (R. 47-48, 67). The cost of cutting the timber was paid by Triumph (R. 94). Nevertheless, the individual owners of the Elk Mills stock billed the contractor for \$12,062.18 worth of timber (R. 50, 54, 55, 59-60, 68). The contractor, who, before receiving this bill, had substantially completed his work and had made no charge for the lumber taken from the land (R. 48, 49, 50, 51, 52, 59, 67), billed Triumph

for that amount (R. 48, 51, ~~54~~, 68). On July 21, 1942, in the presence of the contractor, William L. Kann, Jr., asked petitioner whether it was "all right to pay this lumber bill," and petitioner replied that he did not see why the bill should not be paid (R. 55-56, 57, 63-64). About an hour later William L. Kann, Jr. delivered to the contractor Triumph's check for \$12,062.18 (R. 54, 64). The contractor then gave William L. Kann, Jr. his (the contractor's) check for \$12,062.18, made payable, at William L. Kann, Jr.'s direction, to the five employee defendants (R. 55, 56-57, 64, 68). This check, dated July 22, 1942, drawn on a bank at Wilmington, Delaware, where the contractor lived, was cashed by the payees at the Peoples Bank of Elkton, Maryland, and was deposited by that bank in the United States mails, to be delivered to the Wilmington bank on which it was drawn (R. 37). The mailing of this check forms the basis of the second count of the indictment (R. 7-8A).

Elk Mills, from the time of its inception to July 31, 1942, received \$600,000 from Triumph on the incendiary bomb contract (R. 94, 129). The net profit of Elk Mills as of July 31, 1942, after salaries and bonuses had been paid but before taxes were deducted, was in excess of \$200,000, largely in the form of fixed assets (R. 94, 129). Nevertheless, petitioner, when questioned at a meeting with the Navy Department's Price Adjustment Board, had stated that Elk Mills profits were 10%

(R. 90). As of July 31, 1942, Elk Mills had \$4,000 in the bank (R. 129). It had paid out \$69,000 to the defendants as salaries and bonuses (R. 128).

In August 1942, the Navy Price Adjustment Board instituted an investigation of Triumph and its subsidiaries (R. 89). Its investigators uncovered the lumber deal (*supra*, pp. 10-11), and questioned petitioner and others concerning it. Petitioner denied any knowledge of the deal, but stated that all parties would be willing to undo what had been done. (R. 93.) When a Navy Department investigator questioned the necessity for the organization of Elk Mills, in order to satisfy the "key" employees, Weil, in the presence of petitioner and Decker, admitted that petitioner, Decker, Willis, and Kamm, Jr., would not have left the employ of Triumph, and that only three employees were threatening to resign (R. 92). After the Navy Department took over the operation of Triumph's plant, petitioner and his codirectors resigned (R. 24), and the five individual stockholders of Elk Mills transferred their stock to Triumph (R. 23, 88).

SUMMARY OF ARGUMENT

There was substantial evidence to establish the existence of (a) a scheme to defraud and petitioner's participation therein, and (b) use of the mails for the purpose of executing such scheme.

Petitioner does not deny that he knew of and took an active part in the general scheme for the organization of Elk Mills and the subletting to it of the incendiary bomb contract. The question whether Elk Mills was a legitimate business device necessitated by the provisions of Triumph's loan agreement with the banks, as petitioner contends, or a means of diverting to the defendants profits which otherwise would have inured to Triumph and its stockholders, as the Government sought to prove at the trial, was submitted to the jury under a charge which carefully reviewed the evidence and which stressed intent as the most important element to be considered in determining the true purpose of the arrangement. There was abundant evidence to support the Government's theory. The jury was entitled to infer that Triumph's loan agreement with the banks merely provided a convenient pretext for the Elk Mills scheme.

The lumber deal was admittedly fraudulent. In essence, it was a scheme whereby the five "key" men could acquire forty-five per cent of the stock of Elk Mills in an apparently legitimate manner without actually paying for it. Petitioner did not try to justify this transaction to the jury. He claimed merely that he had no knowledge of the scheme until it was uncovered by the Navy Department auditors. His contention in this respect

was fairly summarized in the trial court's charge, and was resolved against him by the jury's verdict of guilt. The evidence amply supported the jury's conclusion.

II

Since none of the defendants actually mailed the checks which formed the basis of the indictment, the Government was required to prove that the defendants caused the mails to be used, and that such use of the mails was in execution or in furtherance of the fraudulent scheme. It is well settled that a person may cause the use of the mails even though he himself does not perform or direct the act of mailing. If he intentionally sets in motion a train of circumstances which have as their natural and probable consequence the use of the mails, the act of mailing, although by an innocent instrumentality, is his act for which he may be held criminally responsible. Whether, under the circumstances of a particular case, the use of the mails could reasonably have been foreseen is clearly a question of fact for determination by the jury.

Although petitioner himself did not cash or deposit the checks, he was responsible for their mailing. The trial court properly instructed the jury that, if the scheme to defraud contemplated use of the mails, petitioner was liable for mailings performed or caused by his codefendants in execution of the scheme, even though he may not have

known of the particular use of the mails which forms the basis of the prosecution. The evidence clearly permitted the jury to infer that the mails would be used for the purpose of forwarding checks given as part of the proceeds diverted from Triumph.

It is not disputed that the use of the mails must, in some manner, be in execution or in furtherance of the scheme to defraud, and that, if the scheme has already ended, a subsequent mailing can not constitute the crime. The question whether the scheme was still alive when the mailings occurred depends upon all the circumstances, including the nature of the scheme, the intention to obtain further funds, and the means employed to avoid detection. In the present case there was ample evidence that the use of the mails charged in the indictment was in furtherance of an existing scheme. The scheme, as a whole, was one of diverting profits from Triumph and its stockholders to the defendants through salaries, bonuses, dividends and the like. It was intended to continue at least as long as Elk Mills was performing the incendiary bomb contract. The appearance of legitimacy was thus of the essence of the scheme. The bonus check forming the basis of the third count of the indictment was only one of a series of checks intended to be issued for salaries, bonuses or dividends. It was essential to the continued success of the scheme that all such

checks should clear in routine, uneventful manner as apparently proper obligations of Elk Mills. Consequently, the successful clearance of the bonus checks was part of the whole fraudulent process; it enabled the defendants to conceal their fraud, and to gain time to perpetrate future frauds. The mailing of the bonus check was properly found, therefore, to be in execution of the scheme.

The jury found that the use of the mails in clearing the "lumber deal" check was also in execution of the scheme to defraud. This check was given by the contractor to the five defendants who were the individual owners of the Elk Mills stock ostensibly in payment for lumber owned by them. The evidence provided ample support for this finding. It was a fair inference from the evidence that the payees of the check intended to utilize this means of getting the money to pay for the land, which in turn was to be used as the consideration for forty-five per cent of the Elk Mills stock. The use of the mails to clear this check was, therefore, an integral step in the effectuation of the scheme. It cannot be said that the payees of this check, upon receiving payment upon it, were thereafter not concerned whether or not the check cleared. They were not absconders, not caring what happened after they cashed the check; these defendants had responsible positions with Triumph, all lived in the vicinity of Elkton, and would have had to make the check good if it had

not been paid when presented through the mails by the Elkton bank for payment. Their scheme was not complete when they obtained the cash on this check; it was only beginning.

ARGUMENT

I

THERE WAS SUBSTANTIAL EVIDENCE TO ESTABLISH THE EXISTENCE OF A SCHEME TO DEFRAUD AND PETITIONER'S PARTICIPATION THEREIN

Petitioner challenges the sufficiency of the evidence to establish the existence of a scheme to defraud, and his knowing participation therein. He does not deny that he knew of and took an active part in the general scheme for the organization of Elk Mills and the subletting to it of the incendiary bomb contract, but argues (Br. 20-25) that Elk Mills was a legitimate business device necessitated by the provisions of Triumph's loan agreement with the banks. However, the issue of fraud was submitted to the jury under a charge which carefully reviewed the evidence, and which stressed intent as the most important element to be considered in determining the true *raison d'être* of the Elk Mills arrangement. With respect to the nature of the general scheme, the trial judge charged the jury (R. 215):

* * * so far as what was done is concerned, there isn't much of a controversy as to the facts. The controversy is over the

question as to whether there was the fraudulent intent in the matter. Was this organization of the Elk Mills Corporation a bona fide thing, done without any intent to defraud anybody, as an ordinary corporate matter dictated by the practical business necessities of the case? Or was it used merely as a sham, a pretense, as a scheme to siphon off, as the Government counsel has expressed it, profits which would ordinarily have inured to the benefit of the Triumph Company and its stockholders? In other words, were the defendants named in this case, particularly the defendant on trial, Mr. Kann, was he acting honestly in this matter, or was he acting fraudulently? Did he have a scheme or was he a party to a scheme to defraud the stockholders of the Triumph Company, or was he engaged in perfectly good faith in an ordinary business corporate activity? That is a question for you gentlemen to decide on the facts.

The judge specifically called the jury's attention to the defendants' justification of the Elk Mills scheme (R. 219-220) as it was set forth in Triumph's minute books (R. 14-17), in Weil's letter to the bank seeking approval of the scheme (R. 105-108), and in petitioner's and Weil's testimony (R. 151-155, 166-170). That justification is again urged here by petitioner: that Triumph could not fulfill the bomb contract without capital expenditures, that because of its recent difficulties with the bank, there was no hope of obtaining permis-

sion to expend the required funds, that its "key" men were threatening to leave Triumph's employ unless their salaries were raised, and that under the loan agreement their salaries could not be raised.

There was other evidence, however, tending to contradict this explanation of the scheme. The bank customarily approved Triumph's requests for permission to grant increases in salaries, and, in fact, approved such increases for the "key" men both before and after the organization of Elk Mills (see *supra*, p. 6). Of the five employees who were allegedly threatening to resign in order to compete with Triumph, one was petitioner's nephew and another was a relative of Mr. Decker. There was no evidence that these employees had sufficient assets or credit to enable them to organize a competing organization, and the Government contract had already been awarded to Triumph. Furthermore, the bank subsequently acquiesced in the Elk Mills arrangement, and the letter from its attorneys advising acceptance of the proposal, even if it should constitute a violation of the loan agreement, indicates that the bank would have agreed to almost any plan which would have enabled Triumph to perform its Government contracts.³ The bank had

³ The bank's attorneys after expressing the opinion that the proposed plan was not technically a violation of the loan agreement stated:

"And even if the participation of the ownership of the Company should be prohibited by the agreement, we do not

previously approved increased capital expenditures by Triumph; and six months after the Elk Mills project was started, the bank entered into a new agreement with Triumph whereby the latter's authorization for capital expenditures was more than doubled (*supra*, p. 7). On these facts alone, considered as they must be in the light most favorable to the Government,⁴ the jury was entitled to infer that the loan agreement merely provided a convenient excuse for the Elk Mills scheme.

Even if it be assumed that the organization of a subsidiary corporation to perform the bomb contract might have been justifiable under the circumstances, the jury was nevertheless entitled to find that Elk Mills as actually organized and conducted was a scheme to defraud. The mere fact that petitioner and his codefendants utilized a device which

believe, as a practical matter, that your company could afford to declare a default in its loan. If the loans were to be called, the company would be faced with either ruination or Government operation of its plant, or with the necessity of financing its contracts, or financing elsewhere. If it were possible to force the Company to breach the contract with the Government and we have this default, severe penalties or Government operation might be the result. Either action, therefore, would not improve the present position of your loans. The matter, of course, should be submitted to the Federal Reserve Bank, who will no doubt wish to have their attorneys pass upon it." (R. 104.)

⁴ *Glasser v. United States*, 315 U. S. 60, 80; *United States v. Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Bogy v. United States*, 96 F. (2d) 734, 740 (C. C. A. 6), certiorari denied, 305 U. S. 608.

might have been legitimate does not exonerate them from using such a device as the vehicle for a scheme to defraud. *Holmes v. United States*, 134 F. (2d) 125, 134 (C. C. A. 8), certiorari denied, 319 U. S. 776; *Watlington v. United States*, 233 Fed. 247, 249 (C. C. A. 8), certiorari denied; 242 U. S. 645; *Bettman v. United States*, 224 Fed. 819, 824 (C. C. A. 6), certiorari denied, 239 U. S. 642. Compare *Wardell v. Railroad Company*, 103 U. S. 651.

The evidence was such that the jury could reasonably find that Elk Mills was devised as a method of diverting to the defendants profits which would otherwise have inured to Triumph and its stockholders. The defendants had turned over a million-dollar contract of Triumph, whose stock was owned by the general public, to Elk Mills, a corporation created by them, in which no capital investment was made, 45% of whose stock was held by five of the defendants, and had thereby caused Elk Mills in six months to make a profit of almost \$300,000.

That petitioner and his codefendants realized that their scheme was fraudulent is indicated by the manner in which the Elk Mills transaction was treated by Triumph's board of directors. The bomb contract was awarded on November 27, 1941. According to petitioner's own version of his dealings with Feldman, one of the "key" employees, the proposal to have the contract per-

formed by a subsidiary corporation was discussed at least as early as December 3 (*supra*, p. 4). Yet the notices of the special meeting of the board of directors, which were sent out on December 8, contained no suggestion that so important a question as the organization of a subsidiary corporation was to be discussed. Even more significant on the question of fraudulent intent is the March 17, 1942, special meeting at which the modification of the Elk Mills contract was approved. (See *supra*, p. 7.) By that time Elk Mills had already been organized. If there were no illicit purpose to be concealed, it is difficult to explain why there should have been no reference to Elk Mills in the notice of that meeting or why the modification of the Elk Mills contract should not have been openly discussed at the meeting itself. It is true that directors MacBride and Shirley, when they testified as to their unawareness of the Elk Mills' scheme at Triumph's October 7, 1942, meeting, stated that they had left the March 17 meeting before its conclusion (R. 23-24). However, according to the minutes of the March 17 meeting, the modification of the Elk Mills contract was approved before Shirley gave his report with regard to the tire and rubber situation. MacBride recalled having heard that report. (R. 26-27.) Plainly, therefore, if the minutes of the March 17 meeting were a true record of what had actually occurred, these

two directors would have known of the existence of Elk Mills and of the fact that it had a subcontract with Triumph.

Finally, the haste with which petitioner and his codefendants utilized Elk Mills to award to themselves substantial salaries and bonuses, entitled the jury to infer that the scheme was stamped with the badge of fraud. Weil's letter to petitioner clearly put the latter on notice that the voting of salaries of \$5,200 annually to petitioner and Decker was likely to be regarded as a fraud upon the stockholders of Triumph (*supra*, p. 8). The board of directors of Elk Mills nevertheless not only did not rescind the salaries, but voted themselves and their associates an additional bonus of \$5,000 each. Petitioner's own account of his activities on behalf of Elk Mills (R. 180-181)—unsuccessful efforts to obtain credit standing for a corporation which was receiving large advance payments made by the Government to Triumph—shows that there was no actual justification for awarding him a bonus, particularly since two months earlier Triumph had voted substantial bonuses to petitioner, Decker, and some of the others.

The lumber deal was admittedly fraudulent.

The bonus award by Triumph was cancelled before payment (R. 126-127), but the subsequent rescission does not detract from the probative value of these awards on the question of petitioner's intent to divert Triumph's war profits to the personal use of himself and his associates.

In essence, it was a scheme whereby the five "key" men could acquire 45 percent of the stock of Elk Mills in an apparently legitimate manner without actually paying for it. Under the arrangement approved by Triumph's board of directors, these employees were personally to acquire the land for the Elk Mills building. The lumber deal was their method of getting the money to pay for the land. It appears, from the testimony of Forrestell, Triumph's attorney, that the five men probably intended to use the money obtained from the sale of the lumber to pay the purchase price of the land (*supra*, p. 10), but it is not disputed that, even so, the ultimate result would have been that these men would have acquired their share of the Elk Mills stock without expenditure of their own funds. Petitioner did not try to justify this transaction either to the Navy Adjustment Board or to the jury. He claimed merely that he had no knowledge of the scheme until it was uncovered by the Navy Department investigators. (R. 93, 175, 188.) Petitioner's contention in this respect was fairly summarized in the judge's charge to the jury.* The jury found against petitioner on

* After reviewing the facts of the lumber deal, the judge stated "his [petitioner's] position about the matter is that he did not know about it and he did not learn about it until a month later, when Lieutenant Commander Seidman came to Elkton and investigated the accounts and called it to his attention. And he said that he disapproved of it and he would try to see that these young men would pay back the money. I think ultimately the money was paid

this issue, and, we submit, the evidence amply supports its verdict. There was direct testimony by the contractor, Jackson, that petitioner had authorized payment of the lumber bill (*supra*, p. 11). The jury was entitled, of course, to believe Jackson's testimony (which was first adduced by petitioner's counsel on cross-examination (R. 55)) as against petitioner's denial when he took the stand on his own behalf. (R. 176, 178). The jury was also entitled to infer that, inasmuch as the Elk Mills building had been substantially completed and Jackson had already been paid by July 21, 1942, petitioner knew that when his nephew referred to the lumber bill he was not talking about any outside lumber purchased by Jackson. Furthermore, the arrangement for the exchange of checks with Jackson was made by petitioner's nephew who, by petitioner's own admission, was included in the Elk Mills' scheme on petitioner's insistence, although he had not been included in the original plan. (R. 183.) The other four beneficiaries of the lumber deal were employees of Triumph, which was controlled by petitioner

back to Triumph, or to Elk Mills and thus finally, to Triumph. * * *

"And the Government contends that Mr. Kann did know all about it. The evidence as to that is general rather than specific except in so far as Jackson's personal testimony is concerned, which you will recall. And the Government asks that you find from the evidence that this was a part of the whole scheme whereby profits were to be siphoned from Triumph to the key men, including this check particularly."

(R. 227.)

and Decker, and these men constituted only a minority of Elk Mills' stockholders and board of directors. Under these circumstances the jury might reasonably have concluded that the five individuals who were owners of Elk Mills stock would not have carried on the fraudulent lumber deal without being certain of petitioner's active approval and cooperation. It is not uncommon for a defendant, after fraud has been discovered, to claim ignorance of the reprehensible activities carried on by persons with whom he has been associated, but courts and juries alike have usually found such a plea of ignorance unconvincing when made by a person in active control of the enterprise. *United States v. Mortimer*, 118 F. (2d) 266, 268 (C. C. A. 2), certiorari denied, 314 U. S. 616; *Hyney v. United States*, 44 F. (2d) 134, 137 (C. C. A. 6), certiorari denied, 283 U. S. 824; *Levy v. United States*, 29 F. (2d) 462, 464 (C. C. A. 7), certiorari denied, 279 U. S. 850; *Bettman v. United States*, 224 Fed. 819, 827-828 (C. C. A. 6), certiorari denied, 239 U. S. 642; cf. *Gates v. United States*, 122 F. (2d) 571, 579 (C. C. A. 10), certiorari denied, 314 U. S. 698.

The function of this Court, with respect to questions of this nature, is "only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Burton v. United*

States, 202 U. S. 344, 373. We submit there was such evidence of a scheme to defraud and of petitioner's knowing participation therein.

II

THERE WAS SUBSTANTIAL EVIDENCE THAT THE MAILS WERE USED IN EXECUTION OF THE FRAUDULENT SCHEME

The question raised by petitioner as to the use of the mails is also essentially a challenge to the sufficiency of the evidence. Since none of the defendants actually mailed the checks which form the basis of the indictment, the Government was required to prove (1) that the defendants caused the mails to be used, and (2) that the use of the mails was in execution of the fraudulent scheme. The trial judge carefully instructed the jury that the use of the mails was not a mere technicality but was a "substantial thing"; that the use of the mails was "the gist of the offense" without which the federal courts would have no jurisdiction to punish the defendants (R, 223, 224).

A. *Causing the use of the mails.* It is well established that a person may cause the use of the mails even though he himself does not perform or direct the act of mailing. If he intentionally sets in motion a train of circumstances which have as their natural and probable consequence the use of the mails, the act of mailing, although by an innocent instrumentality, is his act for which he may

be held criminally responsible. *United States v. Kenafsky*, 243 U. S. 440, 443; *Graham v. United States*, 120 F. (2d) 543, 546 (C. C. A. 10); *United States v. Weisman*, 83 F. (2d) 470, 474 (C. C. A. 2), certiorari denied, 299 U. S. 560; *Corbett v. United States*, 89 F. (2d) 124 (C. C. A. 8); *Smith v. United States*, 61 F. (2d) 681, 684 (C. C. A. 5), certiorari denied, 288 U. S. 608; see also *Demolli v. United States*, 144 Fed. 363, 365-366 (C. C. A. 8). The question of the degree of foreknowledge required is not here presented. The trial judge charged the jury that the mailing "must reasonably have been foreseen—more than possibly." (R. 225.) Petitioner did not below and does not here attack the correctness of the charge.

Whether, under the circumstances of a par-

⁷ This is a somewhat stricter requirement than that set forth in *United States v. Weisman*, 83 F. (2d) 470, 474 (C. C. A. 2), certiorari denied, 299 U. S. 560, in which the foreknowledge required was defined as "at most that the steps taken to execute the fraudulent scheme may under the circumstances known to the defendant naturally and probably result in the use of the mails." There is a decision of the Fifth Circuit that the train of circumstances must be such that they will "inevitably" cause the use of the mails. *Spillers v. United States*, 47 F. (2d) 893 (C. C. A. 5). This holding was in effect overruled by the decision of the same court in *Smith v. United States*, 61 F. (2d) 681, certiorari denied, 288 U. S. 608, in which Judge Foster, who wrote the majority opinion in the *Spillers* case, dissented. The later decisions of the Fifth Circuit in *Hart v. United States*, 112 F. (2d) 128, certiorari denied, 311 U. S. 684, and *Lamb v. United States*, 115 F. (2d) 157, show that the rule of reasonable foreseeability is established in that circuit.

ticular case, the use of the mails could reasonably have been foreseen is plainly a question of fact for determination by the jury. Petitioner does not contend that the evidence was insufficient to show the necessary causation. Admittedly, the checks which form the basis of the indictment were cashed or deposited by the payees, petitioner's codefendants, in towns some distance away from the banks on which the checks were drawn. The persons so depositing or cashing the checks must have known that, in accordance with established banking practice,* the paying banks would, as they did, forward the checks by mail to the banks on which they were drawn. The jury could well find that the payees thus "caused" the use of the mails through the instrumentality of the banks. *United States v. Feldman*, 136 F. (2d) 394, 396 (C. C. A. 2), affirmed on other grounds, May 29, 1944, No. 193, 1943 Term; *Hart v. United States*, 112 F. (2d) 128, 131 (C. C. A. 5), certiorari denied, 311 U. S. 684; *United States v. Lowe*, 115 F. (2d) 596 (C. C. A. 7), certiorari denied, 311 U. S. 717; *Goodman v. United States*, 97 F. (2d) 197, 199 (C. C. A. 3), certiorari dismissed, 305 U. S. 578;

* Knowledge of the custom among banks of forwarding out-of-town checks through the mails is imputed to persons of ordinary business experience. *Spear v. United States*, 246 Fed. 250, 251 (C. C. A. 8), certiorari denied, 246 U. S. 667. See also *Shea v. United States*, 251 Fed. 440, 447 (C. C. A. 6), certiorari denied, 248 U. S. 581; *United States v. Decker*, 51 F. Supp. 15, 18 (D. Md.), affirmed, 140 F. (2d) 378 (C. C. A. 4), certiorari denied, 321 U. S. 792.

Federman v. United States, 36 F. (2d) 441, 442 (C. C. A. 7), certiorari denied, 281 U. S. 729; *Tincher v. United States*, 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Savage v. United States*, 270 Fed. 14, 21 (C. C. A. 8), certiorari denied, 257 U. S. 642; *Shea v. United States*, 251 Fed. 440, 448 (C. C. A. 6) certiorari denied, 248 U. S. 581; *Spear v. United States*, 246 Fed. 250, 251 (C. C. A. 8), certiorari denied, 246 U. S. 667.

Petitioner did not himself cash or deposit the checks. He was, however, as the jury justifiably found, a party to the scheme to defraud. Having thus, with criminal intent, joined himself with the others to accomplish a common criminal end, he became liable as a conspirator for the acts performed by his codefendants in furtherance of the common design. *Blue v. United States*, 138 F. (2d) 351, 359 (C. C. A. 6), certiorari denied May 1, 1944, No. 789, 1943 Term; *Steiner v. United States*, 134 F. (2d) 931, 934 (C. C. A. 5), certiorari denied, 319 U. S. 774; *Weiss v. United States*, 120 F. (2d) 472, 475 (C. C. A. 5), rehearing denied, 122 F. (2d) 675, certiorari denied, 314 U. S. 687; *Baker v. United States*, 115 F. (2d) 533, 540 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Alexander v. United States*, 95 F. (2d) 873 (C. C. A. 8), certiorari denied, 305 U. S. 637; *Spivey v. United States*, 109 F. (2d) 181, 184 (C. C. A. 5), certiorari denied, 310 U. S. 631; *Sasser v. United*

States, 29 F. (2d) 76 (C. C. A. 5), certiorari denied, *sub nom. Russell v. United States*, 279 U. S. 836; *Campbell v. United States*, 12 F. (2d) 873, 875 (C. C. A. 9); *Silkworth v. United States*, 10 F. (2d) 711, 717 (C. C. A. 2), certiorari denied, 271 U. S. 664; *Tincher v. United States*, 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Grant v. United States*, 268 Fed. 443, 446 (C. C. A. 6), certiorari denied, 256 U. S. 700; *Freeman v. United States*, 244 Fed. 1, 17-18 (C. C. A. 7), certiorari denied, 245 U. S. 654. While some of the cases cited seem to hold that, if any one of joint defendants knowingly uses or causes the mails to be used in execution of the scheme, his confederates are liable irrespective of whether they contemplated the use of the mails as part of the scheme,* the trial judge in the instant case instructed the jury, in accordance with the more narrow rule laid down in most of the cases, that in order to hold the defendant liable the jury must find that the use of the mails was "part of the whole plan" (R. 224):

* * * although the defendant did not personally mail them [the checks], if he was a party to the scheme with others which involved obtaining the fruits of this scheme by the use of the mails and that some of the

* See *Weiss v. United States*; *Alexander v. United States*; *Sasser v. United States* and *Tincher v. United States*, *supra*.

others, active parties to the whole scheme, did the mailing, the defendant would be bound by that if the mailing was in execution of the scheme. (R. 232.)

This charge was clearly correct. The intent to use the mails is not a necessary element of the offense defined by Section 215 of the Criminal Code. *United States v. Young*, 232 U. S. 155; *Silkworth v. United States*, 10 F. (2d) 711 (C. C. A. 2), certiorari denied, 271 U. S. 664.¹⁰

The scheme may have been carefully designed to avoid the use of the mails but, if the mails are in fact used in execution of the scheme, the statute is violated. *Bogy v. United States*, 96 F. (2d) 734 (C. C. A. 6), certiorari denied, 305 U. S. 608; *Preeman v. United States*, 244 Fed. 1, 17 (C. C. A. 7), certiorari denied, 245 U. S. 654. However, where the liability of one of the joint defendants depends upon an act of mailing performed by a codefendant, most of the cases hold that use of the mails must have been reasonably foreseeable. See, e. g., *Preeman v. United States*, 244 Fed. 1, 17-18 (C. C. A. 7), certiorari denied, 245 U. S. 654;

R. S. § 5480, from which Section 215 is derived, had prescribed use of the mails in execution of a scheme to "be effected by either opening or intending to open correspondence or communication with any other person." The elimination of this phrase from Section 215 by the codifiers in 1909 (35 Stat. 1130) necessarily implied that an intent to use the mails was no longer an essential ingredient of the offense. See *United States v. Young*, 232 U. S. 155, 161, cited approvingly by Mr. Justice Holmes in *Badders v. United States*, 240 U. S. 391, 394.

Spivey v. United States, 109 F. (2d) 181, 184 (C. C. A. 5), certiorari denied, 310 U. S. 631. The basis of this rule has not been articulated in the decisions; but would seem to rest on the principle that, in order to hold a person liable for the acts of coconspirators, the conspiracy must envision the crime. Cf. *United States v. Crimmins*, 123 F. (2d) 271, 273 (C. C. A. 2). However, just as in a conspiracy, a person may be bound by the acts of his coconspirators in furtherance of a conspiracy although he has no knowledge of the particular act performed,¹¹ so, in a mail fraud prosecution against a number of defendants, if the use of the mails in execution of the scheme is reasonably to be foreseen, a defendant is liable for mailings performed or caused by his codefendants although he was not aware of the specific use of the mails which forms the basis of the indictment. *Clarke v. United States*, 132 F. (2d) 538, 540 (C. C. A. 9), certiorari denied, 318 U. S. 789; *Spivey v. United States*, 109 F. (2d) 181, 184 (C. C. A. 5), certiorari denied, 310 U. S. 631; *Shreve v. United States*, 103 F. (2d) 796, 813 (C. C. A. 9), certiorari denied, 308 U. S. 570; *Hallowell v. United States*, 253 Fed. 865, 868 (C. C. A. 9), certiorari denied, 249 U. S. 615.

There can be no question that under the evi-

¹¹ *Bannon and Mulkey v. United States*, 156 U. S. 464, 468; *United States v. Manton*, 107 F. (2d) 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Allen v. United States*, 4 F. (2d) 688, 692 (C. C. A. 7), certiorari denied, *sub nom. Hunter v. United States*, 267 U. S. 597).

dence in this case the jury was entitled to infer that the scheme in which petitioner participated was one which contemplated use of the mails. When the trial judge, at petitioner's request, instructed the jury that the direction to the postmaster at Elkton for the deposit of Elk Mills mail in Triumph's mail box (R. 228) had "no probative force in determining whether or not the defendant mailed or caused to be mailed the checks mentioned in the second and third counts of the indictment" (R. 228), he was being more favorable to petitioner than was required. The judge's charge in chief had been more accurate in stating that the direction to the postmaster was "no evidence standing merely by itself that these two checks were sent in execution of a scheme" (R. 223). The fact that extensive use of the mails was known to have been necessary as part of the organization of Elk Mills was a factor which the jury should have been allowed to consider in determining whether petitioner was a party to a scheme which contemplated the use of the mails. Even without the aid of this evidence, however, the jury was justified in finding that, since the scheme charged in the indictment contemplated the setting up of Elk Mills as an active business corporation, it was necessary to use the mails to effectuate that scheme. Moreover, there was proof that at least one of the directors of Elk Mills, petitioner, resided outside of Elkton and, under the Elk Mills by-laws, notices of directors' meetings could be

sent to him by mail (Ex. 16, Art. II, Par. 6). The holding of directors' meetings was, of course, a necessary part of the scheme charged in the indictment to divert profits from Triumph to the individual defendants through the superficially legitimate Elk Mills device. Even assuming that the jury was required to find under this charge that petitioner contemplated the use of the mails by the forwarding of checks, there was ample evidence to warrant such an inference. The scheme proved necessarily involved the issuance of a number of checks to petitioner and the other defendants for salaries, bonuses, dividends, etc. Petitioner lived in Pittsburgh (R. 165); and the defendant Willis had a bank account in Newark, Delaware (R. 37). It certainly was reasonably foreseeable that one or the other of these defendants, and perhaps some of the others as well, would deposit Elk Mills' checks drawn on the bank at Elkton in their own banks outside of Elkton and that those banks would necessarily be obliged to forward the checks to Elkton for collection. Indeed, petitioner himself deposited his \$5,000 bonus check in a Pittsburg bank (R. 6A).

B. Use of the mails in execution of the scheme. Section 215 of the Criminal Code provides for the punishment of persons who, having devised a scheme to defraud, use the mails "for the purpose of executing such scheme or artifice or attempting so to do * * *." The matter mailed, although it need not on its face disclose the fraudulent pur-

pose or be effective in carrying out the scheme,¹² must, in some manner, be for the purpose of executing or furthering the scheme to defraud. *Clarke v. United States*, 132 F. (2d) 538, 541 (C. C. A. 9), certiorari denied, 318 U. S. 789; *United States v. Riedel*, 126 F. (2d) 81 (C. C. A. 7); *United States v. Lowe*, 115 F. (2d) 596, 598 (C. C. A. 7), certiorari denied, 311 U. S. 717; *Barnes v. United States*, 25 F. (2d) 61, 64 (C. C. A. 8), certiorari denied, 278 U. S. 607. Hence, it is undisputed that, if the scheme has wholly ended, a subsequent mailing cannot be in execution of the scheme and cannot be a crime under the statute. *Mitchell v. United States*, 118 F. (2d) 653, 655 (C. C. A. 10); *McNear v. United States*, 60 F. (2d) 861 (C. C. A. 10).

We are thus brought to the question whether the scheme had in fact terminated before the mailing of the checks charged in the indictment. Petitioner contends that the scheme ended when the payees cashed their checks, since the defrauders had attained their objective, the money, and Triumph had been damaged beyond repair in that the drawers of the checks could not have refused

¹² *Durland v. United States*, 161 U. S. 306; *Holmes v. United States*, 134 F. (2d) 125, 134 (C. C. A. 8), certiorari denied, 319 U. S. 776; *Stumbo v. United States*, 90 F. (2d) 828, 832 (C. C. A. 6); *Barnes v. United States*, 25 F. (2d) 61, 64 (C. C. A. 8), certiorari denied, 278 U. S. 607; *Newingham v. United States*, 4 F. (2d) 490, 492 (C. C. A. 3), certiorari denied, 268 U. S. 703.

payment to the banks as holders in due course.¹³ We do not believe, however, that the cases cited by petitioner stand for any such rigid rule. We think that those cases, particularly when considered in the light of other decisions in the same and other circuits, are merely applications to their

¹³ It should be noted that petitioner's argument is based entirely on the premise that both indictment checks were cashed. There is no evidence that the bonus check of the defendant, Willis, which forms the basis of the third count of the indictment, was in fact cashed. The stipulation in respect of the use of the mails provides that this check was "deposited by V. G. Willis, Jr., payee, in a bank account maintained by him, V. G. Willis, Jr., in the Farmers Trust Company of Newark, Delaware, and said bank in the usual course of business caused said check to be cleared by the use of the United States mails" (R. 37-38). Since the stipulation expressly stated that the check forming the basis of the second count was "cashed" it is a natural inference that the Willis check was merely deposited in the usual course and mailed for collection. On this basis, the mailing of the bonus check would unquestionably be in execution of the fraud, since the collection of the funds was a necessary step in obtaining the money which was the object of the conspiracy. *Savage v. United States*, 270 Fed. 14, 21 (C. C. A. 8), certiorari denied, 257 U. S. 642; *Spear v. United States*, 246 Fed. 250, 251 (C. C. A. 8), certiorari denied, 246 U. S. 667. However, it is true, as petitioner contends, that neither the Government nor the court placed any particular stress on this difference in the circumstances under which the mailing of the two indictment checks occurred. For the reasons set forth in the text, we believe that the verdict may be sustained as to both counts on the assumption that both checks were cashed. Petitioner's prison sentence is less than the maximum which could have been imposed on one count, but, in order to sustain his fine in the amount that it exceeds \$1,000, the conviction must be sustained on both counts.

particular facts of the general principle that there must be a scheme in existence and that the mailing must be in furtherance of such a scheme. In all the cases cited by petitioner, the courts found that the relationship between the defrauder and his victim had in a practical, non-technical sense ended before the mailing occurred. Thus, in *Stapp v. United States*, 120 F. (2d) 898 (C. C. A. 5), the victim purchased with his own personal check a cashier's check which he delivered to the defendant. The cashier's check was paid to the defendant by the bank on which it was drawn and was not mailed at all. The check which was mailed was the personal check of the victim drawn on the victim's own bank. The decision in the *Stapp* case rests in part, therefore, on the finding that defendant had done nothing to "cause" the mailing. Moreover, the defendant in that case did not plan to obtain any further funds from his victim and the clearing of the victim's check would have had no effect in aiding the defendant to keep the money he had obtained, since he had already absconded with the fruits of his crime before the mailing occurred. A similar situation was presented in *United States v. McKay*, 45 F. Supp. 1001 (E. D. Mich.), in which the scheme charged was one to defraud Edsel Ford by causing him to pay money to Bass-Luckoff, Inc., on the false representation that funds were due that company in connection with a political campaign.

Bass-Luckoff, Inc., in turn purchased a cashier's check which it delivered to McKay for part of the proceeds, and gave McKay its own check for the other part. McKay cashed these Bass-Luckoff checks, and they were then mailed to the Bass-Luckoff bank in Detroit. In dismissing the indictment, the court held that the scheme charged in the indictment was one to defraud Ford; that Ford had parted with his money before the mailings occurred, and the mailings were, therefore, not in execution of the scheme. Clearly, the basis of the decision was not merely that McKay had cashed the checks but that all relationships between McKay and Ford had ceased before the mailing occurred.¹⁴ In *Dyche v. Hades/peth*, 106 F. (2d) 286, 288 (C. C. A. 10); the scheme involved was one to defraud various business houses by passing worthless checks in return for merchandise. However, each count of the indictment charged the defrauding of a separate corporation. In holding that the indictment did not state an offense and that petitioner was entitled to his release on habeas corpus, the court emphasized the fact that each victim was "sepa-

¹⁴ The court did not consider the question of whether the mailing of the checks was part of the scheme to defraud in that the Bass-Luckoff checks represented a division of the spoils. Cf. *Tincher v. United States*, 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664. See also *McDonald v. United States*, 89 F. (2d) 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697.

ately defrauded by representations made to him alone * * *. There, also, the decision was based upon the finding that, as between defrauder and victim, the scheme had wholly ended before the mailings occurred. Cf. *Rosenbloom v. Hunter*, 143 F. (2d) 673 (C. C. A. 10).

On the other hand, there are many cases in which the mere receipt of the money has been held not to mark the end of the scheme. Thus, where, after the money is received, the mails are used to avoid detection and to give the wrongdoers an opportunity to make use of the money fraudulently obtained, the mailings are regarded as in execution of the scheme. *United States v. Riedel*, 126 F. (2d) 81, 83 (C. C. A. 7); *Davis v. United States*, 125 F. (2d) 144 (C. C. A. 6); *Brady v. United States*, 26 F. (2d) 400, 401 (C. C. A. 9), certiorari denied, 278 U. S. 621; *Preeman v. United States*, 244 Fed. 1 (C. C. A. 7), certiorari denied, 245 U. S. 654. This rule has been applied to "lulling" letters closely related to the fraud even though there is no expectation that further funds will be received from the victim. *United States v. Riedel*, and *Davis v. United States*, *supra*. In schemes involving the "kiting" of checks, the money or credit is obtained immediately, but, since the lapse of time due to the mailing of the checks for collection enables the wrongdoers to make use of the proceeds or to perpetrate further frauds, the mailing of the "kited" checks has been held to be in execution of the scheme.

United States v. Lowe, 115 F. (2d) 596, 598-599 (C. C. A. 7), certiorari denied, 311 U. S. 717. See also *United States v. Feldman*, 136 F. (2d) 394, 396 (C. C. A. 2), affirmed on other grounds May 29, 1944, No. 193, 1943 Term; *Guardalibini v. United States*, 128 F. (2d) 984 (C. C. A. 5). Cf. *Hastings v. Hudspeth*, 126 F. (2d) 194, 196 (C. C. A. 10). In *Steiner v. United States*, 134 F. (2d) 931 (C. C. A. 5), certiorari denied, 319 U. S. 774, where the scheme was one to procure fraudulent tax reductions for property owners, the mailings charged in the indictment were bills sent to the property owners by the attorney involved in the scheme. The defendants contended that, since the object of the scheme was to defraud the State of Louisiana, the scheme was consummated at the instant the illegal tax assessments were entered on the books, and that the subsequent mailing of bills was therefore not in execution of the scheme. The Fifth Circuit, however, on the same interpretation of the fraudulent scheme, held that the mailings were in execution of the scheme to defraud the State, since the collection of the money from clients, although after the tax reductions had been entered, was necessary in order to enable the defendants to continue operations in the future. (134 F. (2d) at pp. 933-934). In *Dunham v. United States*, 125 F. (2d) 895 (C. C. A. 5), the scheme was one by an alleged "expert" in stock market operations to invest money for others. After he received some

money for investment, he sent out statements showing false profits and on the basis thereof received additional investments from persons previously defrauded and from others. While the court in its opinion merely stated that the mailing was clearly in execution of the scheme, the case is a further illustration of the fact that the Fifth Circuit, as well as the other circuits, adheres to the rule that a scheme is not necessarily ended by the receipt of money. See also *Guardalibini v. United States*, 128 F. (2d) 984 (C. C. A. 5).

The difference between responsibility under Section 215 for the use of the mails where the scheme has been wholly executed and where a scheme is still in existence, is illustrated by the decisions in *McNear v. United States*, 60 F. (2d) 861 (C. C. A. 10), and *Stewart v. United States*, 300 Fed. 769 (C. C. A. 8), both of which involved schemes to sell worthless lands. In the *McNear* case all the money due on the contract of sale had been collected before the mailing charged in the indictment occurred, and the court there held that the mailing was not in execution of the scheme. In the *Stewart* case, on the other hand, mailings at a time when notes given for part of the purchase price were still outstanding, were held to be in execution of an existing scheme. A rule similar to that in the *Stewart* case was applied in *Newingham v. United States*, 4 F. (2d) 490 (C. C. A. 3), certiorari denied, 268 U. S. 703, although, in the latter case, the scheme had collapsed before

payment of any of the monthly installments contemplated by the license contract there involved. That the determination of the mailing question necessitates a consideration of the scheme as a whole is also shown by the two decisions of the Tenth Circuit in *Mitchell v. United States*, 118 F. (2d) 653, and 126 F. (2d) 550, certiorari denied, 316 U. S. 702. Mitchell was first tried under an indictment which charged that he represented himself to a named victim as the agent of a major oil company authorized to purchase oil leases at \$50.00 per acre; that he stated to his victim that he knew a man who was willing to sell such leases at \$10.00 per acre and that the company would then repurchase at the higher figure, whereas in fact Mitchell was actually engaged in trying to find purchasers for leases owned by one Dorothy Heard. The mailing charged in the indictment was the act of the victim in sending the assignment of a lease executed by Dorothy Heard to the Commissioner of Lands of New Mexico for recording, pursuant to directions given by Mitchell. Holding that the scheme charged was one to defraud only one person of a definite sum of money, and that the mailing of the assignment was no part of that scheme, the circuit court of appeals reversed Mitchell's conviction (118 F. (2d) 653). In the second case, however, the indictment charged a continuing scheme to defraud a number of people and alleged that, for the purpose of lulling the victims into a false sense of security

and to allow himself time to escape apprehension, Mitchell represented that the recording of the leases was necessary and that after they were duly recorded they could be sold at a large profit. Under this indictment, the court upheld the conviction based upon the mailings of leases to the Commissioner for recording (126 F. (2d) 550, certiorari denied, 316 U. S. 702). All these cases make it clear, we think, that whether the mails are used in execution of a scheme to defraud is essentially a question of fact to be determined in the light of all the circumstances, including the nature of the scheme, the intention to obtain further funds from the victim or others, and the means employed to avoid detection.

In the instant case, the trial judge charged the jury that "the Government must satisfy you beyond a reasonable doubt that the use of the mails was in connection with and in furtherance or in execution, as we say, of the scheme itself" (R. 223), that "as I say, you must find, if you do find, beyond a reasonable doubt that these checks were mailed in furtherance of a scheme. Otherwise, your verdict should be 'not guilty'". (R. 228.) Considering the scheme involved in this case, we think that there was ample evidence to warrant the jury in finding that the mailings charged in the indictment were in furtherance of an existing scheme. While the trial judge in his charge did not refer to the scheme as a continuing

one, he did say that "the question is whether, in execution of the whole scheme, or as a part of it, the mails were used for the purpose of carrying through the scheme of getting the money" (R. 224) and that "it is sufficient if it [the mailing] was a part of the whole plan and was done by somebody else (R. 224). The "whole" scheme, charged in the indictment and established by the proof, was one to divert profits from Triumph to the individual defendants in the form of salaries, bonuses, dividends, and otherwise. The trial judge in his charge stated that the Government's contention was that the scheme was one "to siphon off" profits (R. 215; see also R. 217). The scheme was intended to continue beyond the receipt of the particular part of the profits represented by the indictment checks. It was intended to continue at least as long as Elk Mills was performing the incendiary bomb contract, and it actually did continue until terminated by the Navy Department investigation. The essence of the scheme was the appearance of legitimacy given to the fraudulent transactions. The salaries, the bonuses, the potential dividends could not have been paid under this particular scheme unless the payments were made in normal fashion by Elk Mills checks apparently for proper Elk Mills obligations. Once the fraud was discovered by nonconspirators interested in Triumph's finances, the enterprise was bound to terminate. Consequently, the routine clearance of

the checks, whether cashed or deposited, was a necessary part of the scheme as a whole. This was particularly true of the bonus checks, which were clearly a part of the continuous process of draining off Triumph's funds. As to this count, the facts are very similar to those presented in the case of *United States v. Decker*, 51 F. Supp. 15 (D. Md.), affirmed 140 F. (2d) 378 (C. C. A. 4), certiorari denied, 321 U. S. 792, where the scheme was one by Decker and the petitioner here to divert Triumph's funds to themselves by appropriating money fraudulently represented as commissions paid to Decker's secretary.¹⁵ While the Government did not here, as in the *Decker* case, rely on other checks of a similar nature, the scheme here proved necessarily involved the issuance of checks for salaries, eventual dividends and probably other bonuses as well, over an extended period of time. Salaries were drawn by the defendants from Elk Mills long after the bonus checks were paid (R. 128, Govt. Ex. #14). Hence, the successful clearance of the bonus checks, like "lulling" letters, or the mailing of "kited" checks, was a means of enabling the defendants to conceal their fraud and to gain time to perpetrate other frauds. The mailing was properly found, therefore, to be in furtherance of an existing scheme.

We consider next the sufficiency of the evidence to show a use of the mails in furtherance of the

¹⁵ Petitioner received a suspended sentence in that case.

lumber transaction, upon which the second count was based.

The jury found that the use of the mails in clearing the "lumber deal" check was in execution of the scheme to defraud. This was the check given by the contractor to the five defendants who were the individual owners of Elk Mills stock, ostensibly in payment for "their" lumber. The evidence provided ample support for this finding. It was a part of the scheme alleged and proved that these five defendants would acquire their stock from funds supplied directly or indirectly by Triumph. The evidence showed that the contractor would not issue his check until he received Triumph's check for exactly the same amount. (R. 51, 52, 54, 64, 68.) The evidence also showed that petitioner approved the payment by Triumph (R. 55). The result of the transaction was to mulct Triumph for the benefit of the defendants, which was the essence of the broad scheme alleged. Although the payees of the check retained its proceeds, and did not use it to pay for the land, it was a fair inference from the evidence that they intended to utilize this means of getting the money to pay for the land, which in turn was to be used as the consideration for forty-five percent of the Elk Mills stock. The use of the mails to clear this check was, therefore, an integral step in the carrying forward of the scheme, and hence in execution of it. It cannot be said that the payees

of this check, upon receiving payment upon it, were thereafter not concerned whether the check cleared. Unlike the defendant in *Dyhre v. Hudspeth, supra*, the defendants were not absconders, who did not care what happened after they cashed the check. These defendants had responsible positions with Triumph, all lived in the vicinity of Elkton, and would have had to make the check good if it had not been paid when presented through the mails by the Elkton bank for payment. Their scheme was not complete when they obtained the cash on this check; it was only beginning.

Obtaining the \$12,000 for the lumber was not the end of the scheme even if the lumber deal is considered as an isolated transaction; it was merely one step in the plan to have the employee defendants obtain for an apparently valuable consideration their stock interest in Elk Mills. This count of the indictment thus came within the rule that the scheme is not complete until its objective has been fully attained. It resembles *United States v. Kenofskey*, 243 U. S. 440, 443, where the acts of an insurance agent in causing his superintendent to send out false insurance claims were held to be in execution of the scheme, since payment and receipt of the claims were yet to come. See also *Bogy v. United States*, 96 F. (2d) 734 (C. C. A. 6), certiorari denied, 305 U. S. 608, where one defendant, Bogy, was under an obligation to de-

liver bonds to purchasers and another defendant, Spaulding, induced those purchasers to give him a power of attorney to secure those bonds, intending to release Bogy from liability on payment of a much smaller sum than the bonds were worth. Letters sent by Bogy after the power of attorney had been given to Spaulding were held to be in execution of the scheme, although the power of attorney was sufficient for Spaulding's purposes, since the transaction as a whole was not complete until Bogy was released from liability. Until the defendants in this case not only had the money; but were certain that their possession would not be questioned, they could not, and did not, use the money to pay for the land. Hence, the clearance of the check given to them by the contractor was a necessary step in furtherance of the scheme as a whole.

Wholly apart from the continuing nature of the scheme or schemes to defraud, we think that the rule for which petitioner contends would result in an artificial and unrealistic interpretation of the mail fraud statute. The statute punishes anyone who "shall, for the purpose of executing such scheme * * * place, or cause to be placed any letter," etc., in the mails. Unquestionably, the cashing of a check given to a defrauder as his share or part of his share of the proceeds of a scheme is in execution thereof. By that very act, however, when the check is cashed

at an out-of-town bank, the defrauder sets in motion the train of circumstances which necessarily causes the use of the mails. His act in cashing the check is, therefore, an act causing the mails to be used in execution of the scheme. If the mailing of a letter, *e. g.*, in the acceptance of a contract, were the last act necessary to complete a scheme to defraud, there would be no doubt that the mailing was in execution of the scheme, even if receipt of the letter was not essential to its consummation. The cashing of the check in order to obtain the spoils is, essentially, of the same nature. Instead of performing the mailing, the defrauder "causes" the use of the mails. Since by his own act he brings about the use of the mails as an essential part of his scheme, he ought not to be allowed to escape liability on the theory that he is not concerned with the use of the mails. This seems to be the rationale of *Hart v. United States*, 112 F. (2d) 128 (C. C. A. 5), certiorari denied, 311 U. S. 684, and *Tincher v. United States*, 11 F. (2d) 18 (C. C. A. 4), certiorari denied, 271 U. S. 664, both of which involved situations where the checks were cashed. Petitioner contends that the courts in those cases failed to note the distinction between checks sent for collection and checks which were cashed, but the petitions for certiorari in the *Hart* case (Nos. 332 and 339, October Term, 1940) placed particular stress on that

factor, making substantially the same argument as petitioner does here with respect to the status of the bank as a holder in due course. We believe that in both these cases the courts attached no significance to the cashing of the checks, in view of the defendants' deliberate acts which caused the use of the mails. The *Stapp* case, 120 F. (2d) 898 (C. C. A. 5), is not in conflict with the *Hart* decision for, as we have shown (*supra*, p. 38), *Stapp* did not cause the mailing of the check there involved. *Dybre v. Hudspeth*, 106 F. (2d) 286 (C. C. A. 10), is somewhat closer, since under the indictment involved in that case, the defendant must have known that the worthless checks which he gave for the merchandise, would be mailed. His act was not, however, the direct cause of the mailing in the same way as the cashing of an out-of-town check in order to collect the proceeds, since there the defendant did not himself use the banking facilities.¹⁶

The only case which, on its facts, seems to conflict with the proposition for which we contend is *United States v. McKay*, 45 F. Supp. 1001 (E. D. Mich.). There, as we have noted (*supra*, p. 39, n. 14), the court adopted an extremely narrow

¹⁶ The *Dybre* case is, in any event, questionable authority in view of the check-kiting cases (see *United States v. Lowe*, 115 F. (2d) 596, 598-599 (C. C. A. 7), certiorari denied, 311 U. S. 517) for it would appear that, as in check-kiting, the defendant utilized the lapse of time to perpetrate other frauds.

view of the scheme to defraud, considering only the time when the victim had parted with his money and failing to realize that the scheme was not complete until the defrauder had obtained his spoils. It may be that, where the act of causing the use of the mails is the last act in execution of the scheme, the train of causation must be more direct than that necessary to show causation generally under the statute (see *supra*, p. 28, n. 7). But where, as here, the use of the mails is the necessary, almost inevitable, result of the means employed by a defrauder to obtain the proceeds of his crime, we think that the use of the mails should be considered in execution of the scheme, even in situations where the defrauder absconds after cashing the check. Moreover, where, as here, the defrauder does not intend to abscond but utilizes his regular banking facilities for clearance of the check, there is an additional factor to be considered. Whatever the technical legal rights involved, a person cashing a check in his own bank where he regularly does business is not, in a practical sense, assured of his unquestioned right to retain the proceeds of that check until it has successfully cleared the bank on which it is drawn. It is common knowledge that, if objection is raised to the payment of a check cashed for a depositor, banks look to the depositor for reimbursement before seeking to enforce their rights against the drawer as a holder

in due course. Hence, in such situations, there is no substantial practical distinction between checks deposited for collection and checks which are cashed. In both instances, the use of the mails is necessary to complete the fraud. *Hart v. United States*, 112 F. (2d) 128 (C. C. A. 5), certiorari denied, 311 U. S. 684; *Tincher v. United States*, 41 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Decker v. United States*, 140 F. (2d) 378, 379 (C. C. A. 4), certiorari denied (321 U. S. 792).¹⁷

CONCLUSION

Under fair and proper instructions the jury determined the issues of fact against petitioner as to both elements of the offense, the existence of a scheme to defraud and the use of the mails in execution thereof.¹⁸ The Circuit Court of Appeals found that the verdict was sustained by substantial evidence. None of the contentions urged by petitioner, we submit, brings into question "the concurrence of both courts below in the sufficiency of the jury's verdict." *United States v. Johnson*,

¹⁷ The fact that the checks involved in this case were not Triumph's checks but were checks drawn by Elk Mills and by the contractor, is of no consequence, since the scheme (assuming that each check represented an independent scheme merely to obtain the money represented by the check), was not complete until the defendants were assured of their right to retain that money. Cf. *McDonald v. United States*, 89 F. (2d) 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697.

319 U. S. 503, 518. We respectfully submit that the judgment of the court below should be affirmed.

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OCTOBER 1944.

SUPREME COURT OF THE UNITED STATES.

No. 35.—OCTOBER TERM, 1944.

Gustav H. Kann, Petitioner, } On Writ of Certiorari to the
vs. } United States Circuit Court
The United States of America. } of Appeals for the Fourth
Circuit.

[December 4, 1944.]

Mr. Justice ROBERTS delivered the opinion of the Court.

We took this case because it involves important questions arising under §215 of the Criminal Code¹. The section provides that "Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, . . . in any post office, or . . . cause to be delivered by mail according to the direction thereon, . . . any such letter, . . . shall be fined not more than \$1,000, or imprisoned not more than five years, or both."

The petitioner and six others were indicted in three counts for using the mail in execution of a scheme to defraud. Petitioner's co-defendants pleaded *nolo contendere*. He was tried and convicted on the second and third counts, and the Circuit Court of Appeals affirmed the conviction.

The indictment alleged that Triumph Explosives, Inc. is a Maryland corporation engaged in the manufacture of munitions for the United States, a large amount of whose stock is held by the general public; that petitioner was President and a director, one of his co-defendants was an officer and director and five of them salaried executive and administrative employees of the company. The indictment continued that the defendants devised a scheme to defraud Triumph and its stockholders and obtain money for themselves by diverting part of the profits

¹ 18 U. S. C. § 338.

² 149 F. 2d 380.

of Triumph on its Government contracts to a corporation known as Elk Mills Loading Corporation and distributing such profits through salaries, dividends, and bonuses to be paid by Elk Mills to the defendants; that, in pursuance of the scheme, Elk Mills was organized, some defendants elected officers and directors and others elected consultants at substantial salaries, and 49% of its stock distributed to five defendants, who were administrative employees of Triumph, without consideration; that Triumph, pursuant to the plan, subcontracted a Government contract to Elk Mills for 51% of the latter's stock, on a basis which would yield Elk Mills large profits, and would involve utilization of the employees and services of Triumph in the performance of the subcontract; and that the defendants, pursuant to the scheme, received from Elk Mills salaries and bonuses for which no substantial services were rendered, and dividends, to the detriment of Triumph. It was alleged that the fraudulent scheme was misrepresented upon the minutes of Triumph and false reasons for the transaction given. Further, that, pursuant to the scheme, it was to be represented that some of the defendants would purchase with their own money, and convey to Elk Mills, certain lands for the issue to them of 49% of the stock of Elk Mills, whereas it was not intended that these defendants should use their own funds in purchasing the land to be transferred in payment of the stock, and that this plan was carried out. In summary, it was charged that the scheme was such that Triumph should be deprived of the profits rightfully belonging to it and these profits should be distributed amongst the defendants through the instrumentality of Elk Mills; that bonuses were to be paid to each of the defendants out of the profits of Elk Mills, and such bonuses were paid.

In the first count it was charged that the defendants, for the purpose of executing the scheme, caused to be delivered by mail a check drawn by Elk Mills on the Peoples Bank of Elkton, Maryland, in favor of petitioner.³ In the second, it was charged that, for the same purpose, the defendants caused to be placed in the post office at Elkton a check drawn by One Jackson on Industrial Trust Company of Wilmington, Delaware. In the third, it was charged that, for the same purpose, the defendants caused to be delivered by mail a check drawn by Elk Mills on the Peoples Bank of Elkton in favor of one of the defendants, Willis.

³ The Government abandoned the first count at the trial.

At the trial the Government proved the corporate existence of Triumph, proved that Triumph held Government contracts, that Elk Mills was incorporated and became subcontractor of a Government contract, that the stock of Elk Mills was distributed amongst certain of the defendants and Triumph, as in the indictment alleged, that, under the subcontract, Elk Mills was in receipt of substantial profits and that these profits were used to pay salaries and bonuses to the defendants, including petitioner. The Government offered evidence tending to prove that certain of these actions had been concealed from other directors of Triumph and that the true situation was discovered when a federal officer made an audit of Triumph's transactions under Government contracts.

The petitioner offered evidence tending to prove that in order to expand Triumph's business two banks had loaned large sums to Triumph under written agreements which restricted the amount it could invest in capital assets and restricted the salaries and bonuses it could pay; that the four defendants who were executive employees were dissatisfied with their compensation and threatened to leave Triumph unless they should receive increased compensation; that the directors of Triumph devised the plan of incorporating Elk Mills and subcontracting with it to make possible the payment of salaries and bonuses without violating Triumph's agreements with its banks; that petitioner had no other motive in participating in the transactions relating to Elk Mills, and that, upon being advised of the arrangement, Triumph's banks were of opinion that it did not violate the agreements.

It was proved by the Government that one Jackson contracted with Triumph for the building of a factory for Elk Mills on land conveyed to Triumph by several of the defendants. Some of these defendants informed the contractor that he might use the timber standing on the land in the construction of the building. After he had done so they falsely represented to him that they owned the timber and that he must pay them some \$12,000 for it. He did so, by a check, to their order, and, in turn, billed Triumph for the same amount. There was evidence that the petitioner was asked whether it was proper to pay the bill and that he stated he did not see why not. It is not contended that the petitioner received any of this money, and his evidence tended to show he had no knowledge of this fraud perpetrated on Triumph.

The use of the mails proved under count 2 was this: The check of Jackson, the contractor, for purchase of the timber, to the order of defendants Deibert, Feldman, Kann (not petitioner), Prial, and Willis, was by them endorsed and cashed at the Peoples Bank of Elkton, Maryland, and was, by that bank, deposited in the mail to be delivered to the bank in Wilmington, Delaware, in which it was drawn.

With respect to the third count, the proof was that Elk Mills delivered its check on the Peoples Bank of Elkton for \$5,000 to Willis, one of the executive employes, as a bonus. It was endorsed by Willis and deposited with the Farmers Trust Company of Newark, Delaware. The Newark bank mailed the check to the Peoples Bank of Elkton.

The petitioner contends, first, that there is no substantial evidence that the transactions involving Elk Mills' subcontract were other than innocent transactions intended to finance the Government contracts held by Triumph, in conformity to that Company's agreements with the bank; or, if the transactions were for an improper purpose, there is no proof that he was a party to any improper use of funds. Secondly, the petitioner urges that he admittedly received no money from the checks which are described in counts 2 and 3, and there is no proof he had knowledge, or reasonable cause to believe, that the checks would go through the mails and, therefore, he did not cause them to be sent or delivered within the intent of the statute. Thirdly, he urges that the mailing of the checks by the paying banks could not be for the purpose of executing the scheme since the defendants to whom those checks were delivered had received the money represented by the checks and each transaction, after such receipt, was irrevocable as respects the drawer.

The petitioner strenuously argues his first contention, but, in the view we take of the case, we find it unnecessary to review the evidence, if we were otherwise inclined to do so in the face of the agreement of the courts below that a case was made for the jury on the question of the fraudulent nature of the scheme and the petitioner's participation in it.

With respect to the second contention, while there may be some question as to whether the defendants may be said to have "caused" the mailing of the checks, we think it a fair inference

that those defendants who drew, or those who cashed, the checks believed that the banks which took them would mail them to the banks on which they were drawn, and, assuming the petitioner participated in the scheme, their knowledge was his knowledge.⁴

The remaining contention is that the checks were not mailed in the execution of, or for the purpose of executing, the scheme. The check delivered to the five defendants by the building contractor in payment for timber they claimed to own was cashed by them at a local bank in Elkton, Maryland. By cashing it they received the moneys it was intended they should receive under the scheme. The Elkton bank became the owner of the check.⁵ The same is true of the bonus check delivered to defendant Willis and deposited and credited to his account. The banks which cashed or credited the checks, being holders in due course, were entitled to collect from the drawee bank in each case and the drawer had no defense to payment. The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.⁶

The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud, such as *United States v. Kenofsky*, 243 U. S. 440.⁷ Also to be distinguished are cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated.⁸ In these the mailing has ordinarily

⁴ *Weiss v. United States*, 120 F. 2d 472; *Steiner v. United States*, 134 F. 2d 931; *Blue v. United States*, 138 F. 2d 351.

⁵ This is so under the Uniform Negotiable Instruments Act which has been adopted in Maryland and in Delaware. Anno. Code of Maryland 1939, Art. 13, Sec. 76; Revised Code of Delaware (1935), c. 78, Art. 4, Sec. 57. This Act has adopted the rule announced in *Burton v. United States*, 196 U. S. 283, 297; *City of Douglas v. Federal Reserve Bank of Dallas*, 271 U. S. 489, 492; *Dakin v. Babb*, 290 U. S. 113, 146.

⁶ *McNear v. United States*, 60 F. 2d 861; *Dybre v. Hudspeth*, 296 F. 2d 289; *Stapp v. United States*, 120 F. 2d 898; *United States v. McKay*, 45 F. supp. 1001.

⁷ See also *Shea v. United States*, 51 Fed. 440; *Spear v. United States*, 28 Fed. 485; *Savage v. United States*, 270 Fed. 14; *Stewart v. United States*, 90 Fed. 769; *Timber v. United States*, 11 F. 2d 18.

⁸ See e. g. *United States v. Lowe*, 115 F. 2d 596; *United States v. Riedel*, 126 F. 2d 81; *Dunkan v. United States*, 125 F. 2d 895.

had a much closer relation to further fraudulent conduct than has the mere clearing of a check, although it is conceivable that this alone, in some settings, would be enough. The federal mail fraud statute does not purport to reach all frauds, but only the limited instances in which the use of the mails is a ~~material~~ part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.

The Government argues that the scheme was not complete, so long as Elk Mills remained a subcontractor the defendant expected to receive further bonuses and profits and that the clearing of these checks in the ordinary course was essential to further prosecution. But, even in that view, the scheme was completely executed as respects the transactions in question where the defendants received the money intended to be obtained by their fraud, and the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it.

We hold, therefore, that one element of the offense defined by the statute, namely, that the mailing must be for the purpose of executing the fraud, is lacking in the present case. The judgment must be reversed.

So ordered

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK, Mr. Justice JACKSON and Mr. Justice RUTLEDGE concur, dissenting.

I hardly think we would set this conviction aside if the collecting bank instead of cashing the checks took them for collection and refused to pay the defendants until the checks had been honored by the drawee. It is plain that the mails would then be used to obtain the fruits of the fraud. And I do not see why the fraud fails to become a federal offense merely because the collecting bank cashes the checks. That would seem to be irrelevant under these circumstances. As pointed out in *Decker v. United States*, 170 F. 2d 378, 379, the object of the scheme was to defraud the bank, and the use of the mails was an essential step to that end. It is true that the collecting bank was a holder in due course against whom the drawer had no defense. But that does not make

that the fraudulent scheme had reached fruition at that point of time. Yet if legal technicalities rather than practical considerations are to decide that question it should be noted that the defendants were payee-indorsers of the checks. They had received only a conditional credit, or payment as the case may be. It took payment by the drawee to discharge them from their liability as indorsers. Not until then would the defendants receive irrevocably the proceeds of their fraud.

Moreover, this was not the last step in the fraudulent scheme. It was a continuing venture. Smooth clearances of the checks were essential lest these intermediate dividends be interrupted and the conspirators be called upon to disgorge. Different considerations could be applicable if we were dealing with incidental mailings. But we are not. To obtain money was the sole object of this fraud. The use of the mails was crucial to the total success of the fraudulent project. We are not justified in chopping up the vital banking phase of the scheme into segments and isolating one part from the others. That would be warranted if the scheme were to defraud the collecting bank. But it is plain that these plans had a wider reach and that but for the use of the mails they would not have been finally consummated.